SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 162

UNITED STATES OF AMERICA, APPELLANT

VS.

E. I. DU PONT DE NEMOURS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

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2 O'CLOCK, P. M., THE SAME DAY (APRIL 4, 1952).

Present: As before noted.

R. R. SMITH (Resumed).

Cross-examination (cont.) by Mr. RENNINGER:

Q. Mr. Smith, at the end of the morning session we were discussing the use of cellophane as a wrapper for bacon?

A. Yes, sir.

8916 Q. And I believe you stated that to the best of your knowledge very little bacon was wrapped in cellophane that was sold at a premium over other similar bacons sold in other materials; is that true?

A. Yes, and I was speaking of the early thirties when I made that statement.

Q. Is that condition true today?

A. There is more cellophane used today than there was before.

Q. Is more cellophane used in the wrapping of bacon at a premium?

A. That I cannot answer.

Q. Mr. Smith, I would like to read to you from the deposition of Mr. R. E. Elmstrom, who is the buyer of Armour & Company, and the deposition was taken in Chicago on December 12, 1951. On page 41 of that deposition the question was asked:

"Question: Well, do you use the most of it for bacon?

"Answer: Cellophane?

"Question: What percentage of your bacon is wrapped in cellophane?

"Answer: Oh, I would say probably 60 to 65 per cent. is.

"Question: What percentage of the bacon is wrapped

8917 in parchment?

"Answer: Well the balance is wrapped in either greaseproof, parchment, or glassine.

"Question: Yes, but is that about evenly divided?

"Answer: No, I would say perhaps let us say 20 per cent in greaseproof and say 10 per cent in vegetable parchment."

And immediately after on page——

Mr. GESELL. Oh, now, he didn't read the whole answer.

Mr. RENNINGER. Oh, yes.

"We have been through a period here where we had to alternate between those two substitutes, greaseproof and parchment, due to availability."

Q. (Continuing.) Again on page 42 of this deposition the question was asked:

"Question: Is it true that Armour has two leading wraps, one a cellophane wrap on a chip board, and the other a parchment

non-supported wrapper? Are they the two most important wraps?

"Answer: On bacon, yes.

"Question: Do you wrap the same quality of bacon in both those wraps?

"Answer: Yes, sir.

"Question: They have absolutely the same quality bacon?

8918 "Answer: Yes, sir; Star brand.

"Question: Depending on which wrap you use is there a difference in price for the same quality bacon?

"Answer: Yes.

"Question: What is the difference in price?

"Answer: I could not tell you what it is, but it is probably—my guess would be 2 or 3 cents a pound.

"Question: And which is the higher wrapper?

"Answer: The cellophane.

"Question: In other words, when you wrapped the same quality bacon in cellophane you got a premium price of 2 or 3 cents a pound?

"Answer: That is right."

Do you feel that that is a substantial use of cellophane in the wrapping of bacon?

A. Oh, yes, it is a substantial use.

8919 Q. Is not Armour & Company one of the leading meat packers in the United States?

A, Yes, they are. One of the leading.

Q. In your estimation then, Mr. Smith, what peculiarities or what characteristics of cellophane were responsible for the fact that a buyer is willing to pay this difference in price?

A. Now where is this going, this bacon? Do you know? May I ask that question? There is a big reason for it.

Q. I am asking you why should——

A. Well, it depends on where it goes. If it goes into the self service store, then the self service market is not offered in many cases and certainly does not want to buy a lower grade bacon, because they don't want to slice it themselves. Or rather a cheaper grade of bacon.

Q. Wasn't this the same grade of bacon?

A. What is that?

Q. As used by Armour & Company?

A. Yes, that is correct.

Q. The same grade of bacon?

A. Yes.

Q. Well, you just stated, did you not, that it was a lower grade bacon?

A. I didn't mean to say that. I meant bacon at the same grade at a lower price.

8920 Q. Why not?

A. Because their facilities for slicing in a self service store are not set up the way they are in a service store.

Q. Where is there slicing in this packaged bacon? The packaging is already done, is it not, whether it is wrapped in parchment or in cellophane, in this instance?

A. It is done in three ways. It is done in parchment and in cellophane by the packer. But I am sure if you had asked Mr. Elmstrom, he would have told you also that they sell bulk at even lower price.

Q. That may be true. Let us stick to the particular facts here in this case, Mr. Smith. We are talking about bacon already sliced, the same quality. Sixty-five or more percent is wrapped in cellophane, sold at two or three cents higher than a similar wrap of bacon wrapped in parchment or glassine.

A. Yes.

Q. Now what peculiarities or characteristics of cellophane were responsible for the fact that a buyer was willing to pay this difference in price, in your opinion?

A. Well, in this particular situation the big increase in the use of cellophane has come about through self service, where it is quite obvious, if you look at any self service store, they employ practically all visibility at the moment in the selling of their meats. Now in the case of bacon you will find that the

8921 packer today is, and particularly Armour, is not using the same kind of cellophane that he used to use, and most of them are using a different kind of cellophane than Armour: they are using now an MSAT 86, which is entirely different from PT, in that MSAT 86 prevents the drying out of the bacon and therefore preserves a much better appearance in the self service case than was formerly true in the service store.

Q. You have not answered my question, Mr. Smith. I am asking you, in your opinion, what peculiarities or what characteristics of cellophane were responsible for the fact that a buyer is willing to pay this difference in price?

A. That he is willing to pay the difference in price?

Q. He must be, is he not?

A. Well, I don't know that the buyer, so far as that is concerned, recognizes the characteristics of cellophane in buying. He simply buys the package and he puts it on display.

Q. Don't you think that the average housewife is very cost conscious in what she buys?

A. Yes, I do.

Q. If she buys bacon wrapped at a certain sum a pound in parchment and it is three cents higher in cellophane, why should she pay that difference? She evidently does, because Armour here states that sixty-five or more percent of their bacon is wrapped in cellophane.

A. Well, she must think it is worth it.

Q. Why do you think that she would think that it would be worth the extra price?

8922 A. I can't answer what a housewife thinks.

Q. Well then, Mr. Smith, let us put it this way. You urge the use of cellophane, do you not, as a wrap for bacon?

A. That is correct.

Q. When you go to a meat packer and tell him the price of cellophane and he tells you, well, if I wrap my bacon in cellophane, I am going to have to charge two or three cents more a pound for that bacon,—what sales argument do you give him? How are you able to persuade him to use cellophane?

A. He has got to find that out from his own experience.

Q. That is all you tell him?

A. Why, yes. I can't guarantee anything.

Q. Is not bacon that is sold in cellophane at a higher price per pound than bacon wrapped in vegetable parchment at a less price per pound in a separate market?

A. Again I am confused by your—if you mean are they sold at separate prices, yes; they usually are.

Q. Are they sold to a different class of customer?

A. In some cases, yes.

Q. Well, where there is a difference of this three cents a pound in the example just discussed, does not price make the market?

A. In so far as the dealer was concerned, yes.

Q. How about the consumer?

8923 A. So far as the consumer is concerned, the consumer has a choice of what is offered to her, Mr. Renninger, and she buys what she thinks is satisfaction for her money. That is the only answer I can give you.

Q. In other words, Mr. Smith, the consumer preference makes the market?

A. To a large extent, yes.

8924 Q. In the early days I believe you stated, Mr. Smith, that you did not stress the sale of Dupont cellophane in the meat packing field because of certain peculiar factors in that industry.

You could see no possibility of changing their distribution system. What did you mean by that?

A. I don't think I said we did not stress the sale. Oh, I know what you are talking about. Yes, we decided—and I believe I testified to this—that insofar as our trying to get the packing industry to increase its usage of the transparent package was concerned, of cellophane wrapped bacon, that we were up against a problem of distribution and of the structure of the industry in distributing its goods that we simply could not change, and until such time as that system was changed we saw very little opportunity for doing anything at all.

Q. Will you explain that a little further, Mr. Smith? What do you mean by the distribution system?

A. Yes, I will be glad to, if you and the Court will bear with me.

The two main systems of distribution of the meat packing industry are the branch house and the car route. A branch house, as the name implies, is a permanent branch packing house in which there is a permanent investment, real estate, equipment, freezing facilities and what not. That serves a certain area. That branch house has this kind of a problem: Its profit is made
8925 through the turnover of a perishable product. Now, this is common practice in the industry and was in those days:

For example, if at the end of a certain turnover period, we will say of two weeks, if three days before that time one of the competitive packers in the area were to find out that he was what he called long in bacon, that is, that he had more bacon than he could dispose of, he went out and sold that at a price. He had to; he had no choice in the matter.

What happened then was that in order to sell the item fast, instead of trying to push packaged goods, either cellophane wraps or parchment or greaseproof, where he could he sold bacon in hundred-pound lots if possible, with a differential of as much as 6 to 7 cents a pound, and I know because I spent weeks traveling with branch house salesmen.

Point No. 2: A car route is an entirely different proposition. A car route is a moving branch house and it serves an area of distribution that is too small to be handled by putting a permanent branch house there. It happens to be one of the major distribution methods used by the industry, and the last report I saw was that there are over five thousand car routes in the United States.

Now, what the car route is is this:

In 1937 or 1938 I spent about two or three weeks working with car route salesmen out of Middletown, New York, for Wilson & Company. Here is what happens:

8926 He goes out in the morning. On a Monday morning—and his job is to sell a carload of meat from Monday until Thursday evening. He has four days to do it. That is about 31,000 pounds of meat. Now, he gets charged the full car penalty whether he sells that carload of meat or not.

If he goes out on Thursday morning and finds he is 9,000 pounds short of filling that car because of competitive activities in the market with other packers, he does not go out and try to sell a six-pound box of bacon, but what he does do is try to sell all the tonnage he can, and where a dealer wanted to buy bacon, instead of offering it to him in package form, whether it be parchment or cellophane, he tries to sell hundred-pound lots if he could; so in many cases the dealer never had a chance or the consumer never had a chance to see that item in cellophane.

Now, that has happened lots of times in my experience with these men, which is the reason—you asked why, sir, and that is the reason that I reported back to our management that we would be wasting our time in trying to get the packer to change his practices. He could not help himself.

Q. In other words, getting down to the consumer level, the average buyer in a meat market did not as a general rule see the product that they were buying?

A. I beg your pardon? The average buyer did not see the product they were buying?

8927 Q. Or if they saw it, it was usually in carcass form or slab form?

A. Oh, no. You mean the consumer in the store?

Q. Yes.

A. No, because the practice in those days was to buy bulk bacon, best grades, Swift's Premium, Armour's Star, and do their own slicing in off hours, and then they would take a simple piece of parchment or greaseproof themselves and lay that out, put it in the case, put their own margin and markup on it and advertise Swift's bacon, Armour's bacon at so much a pound.

Q. I believe you also stated, Mr. Smith, that this situation continued up to the time of the self-service meat markets?

A. That is correct.

Q. Why was there such a change at that time?

A. Because with the introduction of self-service I think you find among the retailers, and particularly the large meat chains, that a better method of meat merchandising was required than in the old butcher-service days.

Q. In other words, the self-service meat market put bacon and meats in the cellophane industry?

A. No, we had quite a bit of use for cellophane before that time.

Q. What items?

8928 A. On bacon, and sausage and porks and hams at higher prices.

Q. At higher prices?

A. Oh, yes.

Q. And people would buy it at a higher price?

A. To the extent that it was purchased at a higher price, that is correct.

Q. It was quite a large volume of purchases, wasn't it?

A. No, it was not; in relationship to the entire amount of bacon that was sold it was a very small volume of purchases.

Q. Even in view of Mr. Elmstrom's deposition?

A. What period is Mr. Elmstrom talking about?

Q. Mr. Elmstrom was talking over a period of years.

A. What years, sir, please?

Q. It is not entirely clear from the deposition.

A. Well, I saw the deposition this noon, and he was talking from a period of 1940 on, and I believe he said that they did not adopt the so-called Traypak until 1949. I am describing to you conditions that happened in the early thirties.

Q. But at least today large quantities of bacon are being sold at a premium when wrapped in cellophane over a similar item wrapped in parchment or something of that nature?

A. Yes, I guess that is true.

Q. I believe you also stated that the wrapping of fresh meat was of no particular consequence until around 1942 and

8929 that the development of the packing of fresh meats has been due in large measure to the development of self-service meat markets. We are talking about fresh meats in this instance.

A. No, I didn't say that, sir. I did not say it was of no consequence up to 1942. Actually there wasn't any such thing as the self-service of red meats or, for that matter, self-service of any meats up until 1946 or 1947 onward. We did not have a film in 1942.

Q. Why would it be the case that with the development of self-service meat markets the use of cellophane and other items would be so important?

Mr. GESELL. On what, if your Honor please?

By MR. RENNINGER:

Q. In the red meat field, we are talking about.

A. I think you have entirely a different concept. Oh, in the red meat field?

Q. Or in processed meats?

A. Well, now, you have two different matters there. Self-service developed primarily for red meats. There could not be any self-service of meats without a package for red meat.

Q. How did that development occur?

A. Now, I will be very glad indeed, sir, if you care to have me go through this whole thing again.

Q. No, that is not necessary, Mr. Smith. I believe you
8930 stated that with the rise of the self-service meat markets you developed a film for the packaging of red meats; is that correct?

A. That is correct.

8931 Q. Now why wouldn't any other type of wrapper be suitable, such as glassine or wax paper?

A. Because it would not hold the color of the meat, for one thing. There was no product known that would hold the color of red meat.

Q. I believe you stated that cellulose acetate, to a very minor degree, and pliafilm, is also used for the wrapping of red meats; is that true?

A. I stated that cellulose acetate was used to a very minor degree, and pliafilm not to a very minor degree; yes, sir.

Q. Cellulose acetate?

A. Yes, sir.

Q. Do you mean that more cellulose acetate is sold than pliafilm?

A. No.

Q. More pliafilm is sold than cellulose acetate?

A. Yes; that is what I said, sir.

Q. How large a tonnage do you think is involved with reference to cellulose acetate and pliafilm?

A. In the case of cellulose acetate, I wouldn't have the slightest idea. We sell none whatsoever. I believe that the Celanese Corporation—I know they started to promote it, and I understant that they have since decided not to; but people still use it.

And if you want a guess,—which is a guess,—that is all it
8932 is,—I would say in the case of cellulose acetate it may be a couple of hundred thousand pounds a year. It is a very minor use.

Q. Yes. Would that be 1% or less than 1%.

A. Of what, sir?

Q. Of the total transparent wrapping materials used for the wrapping of red meats.

A. No; that would be more than that. That would be in the neighborhood of 10, just offhand.

Q. 10%.

A. If that figure is accurate. And I told you it was just a guess.

Q. How much pliafilm do you feel is used for the wrapping of red meats?

A. I believe I testified that we actually did not know for certain how much was used, but the best estimate that we can arrive at at the moment has been in the neighborhood of two million pounds.

Q. What percentage of the overall transparent flexible wrapping materials used for the wrapping of red meats do you estimate this to represent?

A. Taking last year, just roughly, last year,—I am giving you a rough estimate of somewhere between 20 and 25%.

Q. Is it not true that pliafilm is principally used on large cuts of meat or angle cuts of meat, because of the fact that cellophane would tear easily if it were used on that type of meat?

8933 A. I don't know.

Q. Well, isn't it true that cellophane is not recommended for us on large cuts of meat?

A. No, it is not true.

Mr. GESELL. I don't understand either the question or answer there. Does he mean that it is recommended or is not, your Honor?

The COURT. I don't know.

Mr. GESELL. I object to the question as being indefinite.

The COURT. Reframe your question.

Mr. RENNINGER. Yes.

By Mr. RENNINGER:

Q. Is it not true that Dupont cellophane is not recommended as a wrapper for large cuts of meat which have bones extruding therefrom?

A. No, it is not true.

Mr. GESELL. There is a double negative in that question. I object to it. It is the same question and the same answer. Why don't you ask him directly, is it? Is it recommended for it or not?

Mr. RENNINGER. I thought I did.

Mr. GESELL. No, you haven't yet.

By Mr. RENNINGER:

Q. Is it recommended?

8934 A. Yes, it most certainly is.

Q. All your salesmen so recommend it?

A. We most certainly do.

Q. For large cuts of meat?

A. Yes, indeed.

Q. Is it not true that cellophane would puncture more readily?

A. Under certain conditions, possibly so.

Q. But you think cellophane is a logical application for that use?

A. I most emphatically do.

Q. Do you feel that cellophane is superior to pliafilm for that particular use?

A. Now you want my viewpoint as a seller again? I suppose you do. Yes, I do; and I have said so many times.

Q. Is it not true that one of the important reasons why pliafilm is used on fresh meat is because of the recent shortage of cellophane?

A. That accelerated their start, yes; that is so.

Q. To what extent are meat items wrapped in wax paper and glassine and greaseproof in the self service markets?

A. I would say frankly to a very small extent.

Q. In other words, then, wax paper, glassine and greaseproof are principally used in those meat markets that are not self service, if they are used at all?

8935 A. I think that is a correct statement, yes.

Q. Whereas the meats wrapped in the films are used exclusively in self service markets?

A. That is correct.

Q. Why is that the case?

A. Well, we will go back again to what I mentioned to you before.

Q. No, it is not necessary to go into the whole distribution angle again, Mr. Smith.

A. I wasn't intending to, sir. I was going to merely make reference to it. May I do that? Well, I hereby make reference to it, Mr. Renninger. You have the same type of conditions prevailing. I believe that Mr. Elmstrom said there is a premium and in a car route operation or in a branch house operation you have not eliminated those distribution practices and problems that I described before.

Q. Do you think that visibility and eye appeal is important?

A. I have mentioned to you, I have testified, and I thought at some length, that I had been trying to sell transparency for nineteen years. I think that speaks for itself, sir.

Q. Mr. Smith, I believe you stated that Dupont sells approximately 70 to 75% of all the wrapping materials used to package red meats. Is that true?

A. I think that at the moment that is true, yes.

8936 Q. That is what you stated on direct?

A. Yes, I believe that is correct.

Q. And just a few minutes ago I believe you testified that you felt that pliafilm had 25% of the market and cellulose acetate 10% of the market?

A. They don't add up, do they?

Q. No, sir.

A. Yes. I can explain that. I think I also testified on direct examination that I thought our figures on the meat industry at the moment were a little shaky, and I think I used those exact words. So when I use a range of 70 to 75%, at this particular stage of the game, in the development of the meat industry, and particularly after a shortage of cellophane last year, there may be 5% cellulose acetate, 10, but the buying rate at the moment I, very frankly, don't know what it is.

Q. What percentage of this market do you estimate that Sylvania has? We have another factor in there, you know.

A. Yes, that is another factor. Frankly, I don't know. I wish I did.

Q. How long has it been since cellophane has been removed from allocation?

A. We formally removed cellophane from allocation in February.

Q. Do you feel that the time has been sufficiently long for Dupont to reinstitute an aggressive selling policy in

8937 the red meat field?

A. Do I feel so?

Q. Yes, sir.

A. I most certainly do. In every field.

Q. Let us turn now to candy, Mr. Smith. I believe you stated that the principal wrapper used on bar candy is glassine, with some foil used; is that true?

A. That is correct.

Q. And I believe you stated that in this field the visibility of cellophane is a detriment, because of the transmission of light, which causes a bloom on the candy; is that true?

A. I said that is what the buyer said.

Q. Is it not true that cellophane is not an attractive wrapper when packaged tightly over a bar of chocolate candy?

A. That is a matter of opinion.

Q. Well, is it not true then, Mr. Smith, that cellophane is not actively pushed as a wrapper for a bar of chocolate covered candy?

A. You say is it not true that it is not pushed?

Mr. RENNINGER. Yes.

Mr. GESELL. That is the same thing again, your Honor. Why don't you just ask him if it is pushed?

Mr. RENNINGER. All right. Is it pushed?

The WITNESS. I am not mentally agile at the moment.

8938 Mr. MINICUS. Grammatically, I can't see a thing wrong with the sentence. If Mr. Gesell is unable to follow a double negative——

The COURT. Why do we have to use double negatives?

Mr. MINICUS. A double negative in this sense is not directed to an affirmative at all. Would it make any difference if he put "Is it not true" at the end of his sentence?

The COURT. Well, I prefer Mr. Gesell's suggestion as to the form of this particular question.

Mr. MINICUS. Yes, sir.

Mr. RENNINGER. I will try to abide by your wishes.

The WITNESS. Now could I have that question, please?

By Mr. RENNINGER:

Q. Is cellophane actively pushed today as a wrapper for a bar of chocolate covered candy?

A. It most certainly is.

Q. Is much of it being so used today?

A. No, sir. Not relatively speaking. Although I testified that we had a nice bar business, and we do, and I hope we don't lose it.

Q. Is not most of that bar business in other types of bars rather than chocolate covered bars?

A. Not entirely, no.

Q. Most of it is, though? Is that not true?

A. Without making a very careful check of that, I wouldn't want to say.

8939 Q. Quite a bit of cellophane is used as a tray-over wrap for bar candy; is that not true?

A. Yes, that is true.

Q. Is this not an entirely separate use or function than the typical candy bar wrapper?

A. Yes, it is.

Q. Do you feel that the cellophane so used would be in competition with the wrappers used on the bar itself?

A. You mean do I feel that the cellophane that is used to overwrap the tray is in competition with the glassine that is used to wrap the individual bars that are inside of the tray? Frankly, you have got me. I don't understand that.

Q. Well, you are talking about competition, and you are testifying that you are in competition with these various other articles. I am trying to find out the limits of this competition.

A. Let me think about that a moment, will you? No, I don't know quite how to answer that question. It is an entirely different type of package.

Q. It is for a separate use or function, is it not?

A. Yes; in that particular case we use it differently; that is correct. Yes, that is correct.

Q. You have not still answered the question. You wanted to think a minute, you stated, to the original question.

Mr. GESELL. Oh, he answered the question.

8940 Mr. RENNINGER. I don't believe that he answered the question.

Mr. GESELL. You asked him four more. You must have thought so. Let us read the transcript and find out. I am sure he did.

Mr. RENNINGER. I will ask the question again.

By Mr. RENNINGER:

Q. Do you feel that cellophane when used as an overwrap for a group of candy bars that are wrapped in another material, that that cellophane is in competition with the materials used directly around those particular bars?

A. Well, not in that particular case. There is one use that we can't get, and here is another use that we can get.

Q. In other words, they are for different purposes, different uses?

A. In that particular application, that is correct, sir. Oh, yes.

Q. Is not the bar candy industry principally a converter item?

A. I believe that is so.

Q. That the wrappers are printed and furnished to the candy manufacturers by the converters? Is that the case?

A. Yes.

Q. And the converters vie with one another for this busi-

8941 ness and will furnsh any material that the candy bar manufacturer thinks is the best wrapper for its candy?

A. I think that is generally true.

Q. I believe you stated on direct examination that Charm candy mints are wrapped in foil; is that right?

A. Charms candy mints?

Q. Yes, sir. Charm candies.

Mr. GESELL. What is the page reference, Mr. Renninger?

A. I think I know what you have in mind. I was speaking of that five-cent Charms unit, which is overwrapped on the outside with foil. It was in cellophane.

Q. Are some of them wrapped in cellophane today?

A. Some of——

Q. The Charm candy?

A. Of this particular unit?

Q. Yes.

A. Not the particular one I have in mind, no. We had it. They got it. We hope to get it again.

Q. Well, let us take this particular Charm candy. I don't know whether this is what you had in mind. Will you please open that, Mr. Smith? What are the various wrappers used in that candy, for the wrapping of that candy?

A. Well, it looks like this is cellophane, I am glad to say; and here is paperback foil. That is what it looks like to me.

8942 Q. That is a laminated foil?

A. I would not be able to tell you that right offhand.

Q. Is there a coating on the outside?

A. It looks like it, but I would not be able to tell you that either just by looking at it.

Q. Do you feel that the various wrappers on that package of candy are used for the same function or for different functions?

A. I am not going to be able to answer that question.

Q. They are reciprocal functions, are they not?

A. What do you mean by that, sir?

Q. For different uses? For a different purpose?

A. Well, this is an individual wrap, if that is what you mean, and this is an overwrap of the individual units, if this is what you mean.

Q. Do you feel that the various articles in this instance are in competition one with the other?

A. On this particular individual package?

Q. Yes, sir.

A. Not in this particular individual package, no. I mean one is one and one is the other.

8943 Q. Mr. Smith, do you feel that in this particular package there cellophane serves one purpose and the wrapper serves another purpose?

A. Yes, I think so.

Q. Turning to crackers and biscuits, Mr. Smith, I believe you broke that down into sponge goods and sweet goods?

A. That is right.

Q. Here again I believe when you entered that field glassine and wax paper and bake cartons were already in that field, and I believe you said that Dupont's first sale of cellophane in that field was as an overwrap for the National Biscuit Company's Nobility Assortment?

A. No, I did not. I merely gave that as an example of the type of business we had in the early days.

Q. Let us just consider this Nobility Assortment. This was a premium product, was it not?

A. Yes.

Q. That was a product appealing to a certain class of trade, was it not?

A. Frankly, I don't know. It was high priced.

Q. If it was higher priced do you not think that certain people would be able to afford that particular package, whereas other types of individuals would not be able to?

A. I think that is a reasonable statement, yes.

Q. And therefore the customers buying the Nobility As-
8944 sortment represented a different class of trade from those purchasing N. B. C.'s regular assortment?

A. The people who bought the Nobility Assortment bought it and those that didn't buy it didn't buy it. That is the only answer I can give you, sir.

Q. But there was a sale for both items?

A. For both items?

Q. Yes, the regular assortment and the Nobility Assortment?

A. There were hundreds of regular assortments.

Q. But the Nobility Assortment was a premium-priced article?

A. Oh, yes; yes. It was a higher-priced line, a higher-priced cracker than the others.

Q. I believe as far as sponge goods is concerned you stated that the same general situation existed in this field?

A. Not quite. No, I did not state it that way. I stated in that field, in the field of sponge goods at that time that there were generally two lines of saltines primarily or soda crackers. One was the price competitive line and the other was a line higher in price which was the line the manufacturer hoped he would be able to sell if he could.

Q. And on this higher-priced line cellophane was used; is that right, or you were able to sell it?

A. We were able to sell some for that purpose.

8945 Q. For that line?

A. That is correct.

Q. And here also did this quality line appeal to a specific class of trade generally distinct from the individuals buying the general line of product?

A. The same answer is true as in the case of the other. Yes, people who felt they wanted to pay more for the quality saltines bought them, and those who didn't, bought the other.

Q. On fractional packaging of sponge goods do you not feel that if cellophane was in adequate supply when fractional packaging was first used in 1947 that all the manufacturers would have used cellophane in place of glassine?

A. Do I feel that they would all have used cellophane in place of glassine?

Q. Or the majority of them, yes.

A. No, I don't think so. Very frankly, I do not.

Q. Is it not true that several large concerns wanted to use cellophane for fractional packaging in 1947 and 1949, and since you could not guarantee them an adequate supply of cellophane they were forced to turn to some other materials?

A. Yes, I think there were three or four had that problem.

Q. Taking the National Biscuit Company as an example, how much of any packaging material do you feel that they would require for their fractional packaging of, say, saltines alone?

8946 A. I would not want to guess. It is a very substantial quantity, believe me.

Q. Has Dupont up to within the last six months been in a position to supply such an additional tonnage?

A. No, I would not think so. At least we certainly didn't think we were.

Q. Do you consider visibility and eye-appeal to be important in fractional packaging?

A. In the all-over effects of the package, I most certainly do.

Q. In what way, Mr. Smith?

A. I think—you are asking my personal opinion now—I think when the package is opened I think that the appearance of the package has a very good effect upon people, which is my opinion.

Q. Turning now to frozen foods, Mr. Smith, I believe you stated in the beginning that Birdseye, you had 100 per cent. of their business?

A. I think that is right, yes.

Q. How did the cost of frozen food items in those early days compare with the cost of frozen food packages today?

A. I would not know.

Q. It was not a competitive field?

A. You are speaking now between—All frozen foods?

Q. Yes.

8947 A. Not while Birdseye Snyder was the only one. I don't see how it could be.

Q. In those early days frozen foods were comparatively a high-priced item or at least the manufacturer could charge enough for his goods to stand the extra cost of cellophane?

A. I don't think that is a problem at all and in General Foods I don't think at that time they had anything to do with it at all. I think that the General Foods Corporation, and I will go so far as to say I know the General Foods Corporation when they established a protective wrapper for their products they set up specifications which in their opinion were going to do the best protective job according to their standards, and that is the only reason that I can think of why cellophane was used.

Q. And cellophane gave adequate protection?

A. They thought so.

Q. I believe you stated that polyethylene and to a lesser degree pliofilm and Cry-O-Vac are used principally for frozen eviscerated poultry because of the durability of those wrappers under extreme cold temperatures?

A. Yes, sir, those are two of the very important characteristics of those materials.

Q. Does cellophane have this quality of standing up under extreme cold temperature?

A. Yes, I think it does, or Birdseye Snyder could not
8948 use it on frozen foods at 20 below zero.

Q. I think you stated in various other instances, Mr. Smith, that cellophane was not sufficient for that purpose. I remember one instance particularly you stated that as far as carrots were concerned—I believe it was carrots——

A. No.

Q. That in any event you mentioned several times that you felt that cellophane was not particularly a good package for use under extreme cold temperatures?

A. No, I said under extreme conditions of handling at low temperature.

Q. Extreme conditions of handling?

A. That is right, and I was speaking at the time of frozen poultry in a frozen food case where it is tumbled around by the consumer in picking it up and a five or six pound chicken or a twelve or fifteen pound turkey is dropped two feet. Those are some of the problems.

Q. In other words, it is the handling that makes cellophane unsuited for this purpose?

A. A combination of factors. There will be a lot sold, but not to the extent that we at one time felt.

Q. Under cereals I believe you stated that cellophane is hardly used at all for the packaging of cereals and that the principal wrapper is a cardboard box with an inner liner or an outer wrapper of glassine or wax paper; is that true?

8949 A. I think that is substantially correct, yes, sir.

Q. Is not the principal use of cellophane in the cereal field in the complete overwrap of a tray or carton of ten individual cereal packages?

A. It is at the moment.

Q. Do you consider the use of cellophane for this purpose to be in competition with wax paper or glassine in that instance?

A. Yes, I do.

Q. They are used for different functions, are they not?

A. Yes, but a waxed glassine or a wax paper overwrap could be used.

Q. In addition to the glassine or wax paper overwrap that they already have on the individual carton?

A. Yes, it could be.

Q. As to the two items, that is, wax paper and glassine used as the overwrap for the individual carton and the cellophane used as the tray overwrap do you feel in that instance that they are in competition one with the other?

A. Would you read me that question again?

(The last question was read by the Reporter.)

A. Yes, I do.

Q. Even though they are for different purposes?

A. They are for purposes of protection.

Q. Both of them? They need both for protection?

8950 A. I think so, and I think the cereal manufacturers think so.

Q. Do they wrap them that way when they are in individual packages, larger packages?

A. No, I don't believe they do. We would like to see them, but they don't.

Q. But for the little package they need that extra protection of cellophane, whereas for the larger package they don't need that extra protection of cellophane?

A. Mr. Renninger, let me see if I get this straight. Do I understand you to say that the individual packages of ten are overwrapped individually in glassine or wax paper and then the outer wrap in cellophane?

Q. Are they not?

A. I don't believe that is so.

Q. Are you sure of that?

A. I think I am quite sure of it.

Q. Do you not know of certain instances where the individual packages are wrapped in cellophane and also overwrapped in cellophane?

A. I think there is one package on the market, yes.

Q. As to fresh produce, Mr. Smith, I believe that you stated that the other articles used for wrapping fresh produce are cellulose acetate, polyethylene, and pliofilm; is that correct?

8951 A. That is correct.

Q. Why are only films being used in this market?

A. Well, they really are not actually. There is a tremendous amount of kraft paper being used in this market, which makes a self-service package. But I see your point. I will answer your question. I think it is because the films actually give a better job of protection primarily to these very difficult to package products.

Q. You feel that the kraft paper that you are speaking of is in competition with cellophane in this instance, then?

A. Yes, I do.

Q. What about glassine and wax paper? Are these papers adequate for this use?

A. I don't think so.

Q. In what way are they lacking?

A. Actually I don't know. As I testified the other day, I am not an expert on produce and I am just giving you now a curbstone opinion, and I don't want you to take it as final. But I don't believe that the qualities of wax paper and cellophane in relation to the living organism of green produce, for example, would give an adequate job of protection in a sealed package. Now, I may be wrong about that, but I think that is correct.

Q. Do you feel that in the packaging of fresh produce that transparency is important?

8952 A. I do.

Q. As to the wrapping of carrots I believe you stated that polyethylene was the principal wrapper used and that cellophane will not stand the icing necessary for these purposes?

A. It won't do a good job under severe icing conditions when carrots are packaged at the grower level. We have been trying that for a good many years and that is why there is a very definite feeling in the industry that carrots packaged at the grower level, for example, in Texas and shipped into Chicago probably will go to polyethylene.

Q. In other words, the wrapper used depends upon the factors in the particular industry?

A. Oh, in every case, every industry, every product.

Q. I believe you stated that applies are packaged at the grower's level in five-pound pliofilm bags and that cellophane is used on small trays of applies at the store level; is that true?

A. Yes, and I added further to that, I said that pliofilm was the original one to get started in that, and then polyethylene came along and competed in the same field with packages of that size, and we are working and competing against both pliofilm and polyethylene at the store level in smaller units. That is correct, sir.

Q. Cellophane, though, is not strong enough to be used

8953 on the larger package; is that not true?

A. I think that is true, yes.

Q. Do you feel that pliofilm used on packaging apples at the grower level is in competition with cellophane used to package applies at the store level?

A. No, they are used for different purposes.

Q. As to cigarettes, Mr. Smith, I believe you stated in the wrapping of cigarettes, that before the introduction of cellophane as

an outer wrapper they were wrapped in waxed glassine; is that true?

A. I think that is true.

Q. What factor or factors do you feel were responsible for the displacement of glassine with cellophane?

A. I think I testified and I testified, as I remember, that I had no personal knowledge of the reasons given at the time, but that my experience with Brown & Williamson down in Louisville, Kentucky, provided some background for my statement that the cigarette industry was looking for a better protective package at that time. They were looking also for one—at least the ones that adopted this obviously were looking for one that would lend itself to the very important factor in the cigarette industry of heavy consumer advertising with an entirely different slant, and they were able by the development of a better package to deliver a better package to the smoker.

Q. Cellophane was more expensive than glassine, was it
8954 not?

A. I am quite certain of that, yes.

Q. What importance do you feel that visibility and eye-appeal had in the change from glassine to cellophane?

A. I don't really know. If it were my business I would say it was quite important, but I don't really know.

Q. Speaking of visibility and eye-appeal, I believe that you stated that at one time you attempted to persuade a packer to use cellophane rather than wax paper and that you showed him these two products, holding samples of each up to the light, and thus comparing the visibility of each product or the transparency of each product?

A. No, I did not say a packer; I said a baker and I said it was Mr. Muntz down in Huntington, West Virginia.

Q. Did you also stress eye-appeal with the baker, this particular baker?

A. Oh, yes, I told him I thought we could develop a better package. He said he had a good enough package and enough transparency and enough eye-appeal and enough visibility at one-third of the cost, so I didn't do it again.

Q. Mr. Smith, I believe that various manufacturers because of the shortage were forced to use glassine or wax paper in place of cellophane, and that as soon as cellophane came into free supply they went back to cellophane due to the lack of transparency and eye-appeal. Is that true?

8955 A. Some did, I guess; some didn't. I don't know why they went back or why they stayed, but some bought cellophane again and some didn't.

Q. Do you know whether this was not the situation that occurred with the United States Tobacco Company in the wrapping of its Model smoking tobacco?

A. I don't even want to attempt to answer that question. I don't know the situation at all.

Q. Well, Mr. Smith, I would like to show you a package of Model smoking tobacco wrapped in cellophane and one wrapped in glassine. How do you feel that they compare as far as transparency is concerned?

A. There isn't any comparison.

Q. How do you feel that they compare as far as eye-appeal is concerned?

A. I like this one better [indicating] and, incidentally, are they using this?

Q. No, not today.

Mr. MINICUS. We had a lot of trouble finding that.

The WITNESS. I thought so. It is a pretty poor grade you have there, Mr. Renninger.

Mr. GESELL. I think I might say there is nothing about this on the record. What Mr. Smith said he liked was the cellophane package better, and he thought it was more transparent.

8956 The COURT. You have it on the record now.

By Mr. RENNINGER:

Q. What are all the different packaging materials used in the wrapping of a package of cigarettes?

A. I think that you have sulphite, foil, cellophane, and I think that is it.

Q. Do you consider these various products to be in competition with one another in this case?

A. Yes, I do.

Q. Are they not all there for a specific purpose?

A. Yes.

Q. A different purpose?

A. Yes, indeed.

Q. They are all used for a different purpose?

A. As they are now being used, that is right.

Q. And each one of these materials serves a different function?

A. I think that is right, in the present package, that is correct.

Q. But yet you feel that in this instance they are all in competition with each other?

A. On the same package?

Q. On the same package.

A. No, I don't think that at all, Mr. Renninger, on the
8957 same package. I feel that our material as a material is in competition with those particular materials because we believe and we are still trying and have tried to replace those ma-

terials with an entirely different kind of package. To that extent I firmly believe we are in competition.

8958 Q. Because you have an idea in your mind that some day you would like to replace these various other articles on a cigarette package, you believe that they are in competition for that reason?

A. Yes, I do. I think it is very much like the oleomargarine industry. If you would ask me, Mr. Renninger, three weeks ago, whether or not we were for these reasons in competition with the average oleomargarine package, I would have said yes, I do. But there were not any. But two weeks ago something happened, and I would like to say this because it exercises my point. Here is one of the biggest in the industry that have just changed. That is why I think we are in competition. It is a matter of time.

Q. But you feel that even though today cellophane and these other materials are used on a package of cigarettes, just because you at some time in the far distant future or near distant future want to take all those other materials off that cigarette package, they are in competition with you?

A. I consider that as a com 'itive objective; yes, I do.

Q. Mr. Smith, I believe th you stated,—and I think at this time you were talking about the bakery trade,—that as long as you have been associated with the sale of cellophane Dupont has sold to all branches of that trade, the bakery trade, as intelligently and vigorously as you possibly could?

A. That is correct.

8959 Q. And various other times during the course of your testimony I believe you have also stated that you have continuously tried to open up new markets for cellophane and have vigorously developed new markets and new uses for cellophane; is that true?

A. Throughout the course of my general testimony.

Q. Yes, sir.

A. That is correct.

Q. Mr. Smith, will you tell me during what periods of time cellophane was under allocation?

A. Oh, let me think now. Cellophane was under allocation, I think, from 1941, the end of the year, and then it went off again in 1942 and came back on again. For practical purposes, I think you can say pretty continuously from the spring of 1942 up until about April of 1949, and then until February of this year.

Q. So practically since World War II cellophane has been under allocation, with one or two minor exceptions?

A. That is right, sir.

Q. It is my understanding,—and correct me if I am wrong,—that to a great extent cellophane is more or less a seasonal item,

that the months in which cellophane is principally sold are in the fall months, and that there is a slackening off of sales in the spring and summer. Is that true?

A. That was a pattern pre-war. What the pattern is
8960 at the moment, I haven't the slightest idea.

Q. Then the period during which cellophane was not on allocation was partly due to this seasonal factor?

A. No, not at all.

Q. Not at all? In other words, though, ever since November or December of 1941, cellophane has been on allocation, with one or two minor exceptions; is that not true?

A. I think that is true; yes, sir.

Q. Mr. Smith, it is a little difficult to understand how you have aggressively pushed the sale of cellophane when for the past ten years, with these two minor exceptions, cellophane has been on allocation. Can you explain that?

A. Yes, I think so. At the time we went on allocation, just before the war, there were certain major developments that I have described in the candy field, in the cracker and biscuit field, in the produce industry, and the meat industry, from an experimental standpoint. Several of them, namely, the candy and the crackers and biscuits, particularly, had got a start on a basic change in their method of selling, which I have described, and during all of this period of allocation we have been attempting to develop those fields for the future just as intelligently as we possibly could.

Q. Under those conditions, would you not have to let some of your other markets go to do that?

A. Not necessarily. That is a very greatly misunderstood
factor in this business, Mr. Renninger. At the end of
8961 the war, for example, or rather during the war, everybody had to go out of cellophane. Sometimes there were not any. Certain end uses were established prior to the war. When they came back and the war was over, a lot of people never used it again. So you had always during that period the people who wanted more and people who wanted less, and in no case that I can think of could that business have grown without intelligent developmental work, even under shortage.

Q. Under a period of shortage, though, you were able to sell every pound of cellophane that you could produce?

A. At the particular time we were producing it; that is correct.

Q. Well, I don't see how you could have aggressively pushed the sale of cellophane and opened up new markets and developed new uses for cellophane when there was not enough cellophane to go around.

A. In the meat industry, the answer is quite simple. In the meat industry, we took about one-tenth of one percent of our production, with the full knowledge and understanding of all of our other customers that we were taking that for experimental purposes, in the interest of our business in later years. It was practised by all concerns during the war.

Q. Mr. Smith, were cigarettes on allocation at any time?

A. I believe so.

Q. When?

A. I believe in the latter part of 1944 and during the
8962 summer of 1945,—the early part of 1945.

Q. Was that due to the fact that the cigarette manufacturers agreed that they could do without cellophane during the summer months?

A. They didn't want to.

Q. I know they didn't want to, but they were forced to?

A. There just was not enough for them to use during the entire year; that is correct.

Q. With that one exception, then, the requirements of the cigarette manufacturers for cellophane have always been met; is that not true?

A. I think that is true, yes.

Q. I believe you stated that you specially train Dupont salesmen towards creative industrial selling, and that your salesmen could not be order takers, and if they were, they would fail. Is that not true?

A. That is my opinion.

Q. In actuality, Mr. Smith, due to the shortage for the past ten years the Dupont salesmen have been little more than just that, order takers; is that not true?

A. Who says so, sir?

Q. What is that?

A. Is that your opinion, sir?

Q. Is that not true?

A. No, it is not.

Q. If they could sell all the cellophane that they
8963 could get their hands on, how are they any more than just order takers?

A. Today?

Q. I am not speaking of——

A. Technically speaking, yes, Mr. Renninger,—and this is a very technical point,—that when you are on allocation it is not necessary for you to sell in order to get an order. That must be obvious. But from the standpoint of developing our markets to absorb an additional increment in production that is coming

in, you can't be an order taker and do that, and you never can in this business.

Mr. RENNINGER. That is all.

The COURT. Is there any redirect?

Mr. GESELL. Yes, your Honor.

Redirect examination by Mr. GESELL:

Q. How long had you been working to get your cellophane on oleomargarine before you landed the piece of business you referred to a minute ago?

A. As long as I can remember.

Q. During the war and during the post-war period, were glassine, wax paper, and other flexible packaging materials in short supply, just as cellophane was?

A. Yes, they were.

Q. Has pliofilm been in short supply in recent years?

8964 A. Yes, it has.

Mr. MINICUS. I don't think the question is very definite, your Honor. I think we should have the years that the counsel is talking about. It makes a difference whether they were on short supply between 1944 and 1946 and whether the period was between 1946 and 1949 and whether the period was between 1949 and 1951.

The COURT. Give him a year, Mr. Gesell.

Mr. GESELL. I said during the war and post-war years, your Honor.

By Mr. GESELL:

Q. Did you understand my question to say that?

A. I did; yes, sir.

The COURT. The objection is overruled, for the purpose of the record.

By Mr. GESELL:

Q. During the war, you have been asked whether it was not a fact that cellophane was always sold on cigarettes. Did a cigarette package remain the same throughout the war period as it is today, as we know it?

A. No, sir, it did not.

Q. Did a particular material go off the cigarette package?

A. Yes, sir.

Q. What material was that?

A. Foil.

8965 Q. Why did it go off?

A. Because the manufacturers, I believe, answering a request from the War Production Board, as to which of two critical materials, namely, foil and cellophane, both of which were

used in the war effort to a large extent—which of those two materials they preferred to have, and they preferred to have cellophane; and that is the only reason that they had cellophane.

Q. As these flexible packaging materials are sold in the market place, do the other manufacturers and sellers of other types of material than cellophane urge and promote the eye appeal of their particular product, just as you promote the eye appeal of cellophane?

A. They most certainly do.

Q. And who decides the eye appeal?

A. The buyer.

Q. Is it a fact, as was suggested by Mr. Renninger repeatedly in his cross-examination, that cellophane is sold only on premium products?

A. It is not.

Q. Can you name some non-premium products for which cellophane is sold?

A. Yes, I can name them to a great extent, practically through every field. Five cent peanuts; five-cent candies; macaroni; noodles. How far do you want me to go?

8966 Q. All right, that is enough. But they can be any size. In any field do you have all the premium business or do you share that premium business with other flexible packaging materials?

A. We sure do.

Q. Now assume for a minute, Mr. Smith, with reference to the discussion of whether or not cellophane was essential to the economy, assume that there was not a pound of cellophane made or a pound of cellophane being sold or a pound of cellophane available. Is there any use for which cellophane is sold for which there are not available other materials which would adequately serve the purposes and uses of the buyer?

Mr. MINICUS. Objection. The assumption is entirely unrealistic, and has no basis in fact at all.

The COURT. It might not be an unreal situation if you win this suit.

Mr. MINICUS. That there would be no cellophane available at all?

The COURT. I don't know what relief you have asked for. You have never told me.

Mr. MINICUS. I have offered to outline the relief asked to the Court.

The COURT. Let us get to the crux of it. Objection overruled. Proceed with the question.

Mr. GESELL. What is your answer, Mr. Smith?

The Witness. Will you repeat that question again, please?

8967 (The last question was read by the Reporter.)

The Witness. I do not know of any product that could not be packaged in some other material.

By Mr. Gesell:

Q. You were shown a Charm package by Mr. Renninger, and your testimony showed that part of the package is in transparent cellophane and part of it is in opaque foil. Which of those two materials was used as the outer wrap on that package?

A. The foil.

Q. And has cellophane been on the outer wrap of that package in times past?

A. I feel quite sure it has.

Q. You were also asked about fractional packages. Do you have fractional packaging today which is not packaged in transparent materials?

A. Oh, yes, a great many of them.

Q. Can you name one or two examples?

A. Yes. The Sunshine Biscuit Company, Long Island City; the National Biscuit Company, of New York; there are a few plants of the United Biscuit group; I think there is Felber Biscuit Company, over in Ohio,—I forget where they are—I think they are in Cleveland, Ohio. There is, as I testified the other day, the Carr Consolidated plants, in New England, who were and who are now——

8968 Q. I think that is enough. Now one final question. Is the fact that you are trying to sell cellophane as an overwrap of a tray containing bar candy wrapped in glassine an indication that you have discontinued your efforts to compete with glassine to be the wrap on the candy bar as well?

A. Not at all. We can still do it.

Mr. Gesell. That is all.

Mr. Renninger. If your Honor please, I would like to have just a couple of re-cross questions.

Re-cross-examination by Mr. Renninger:

Q. Mr. Smith, do you know from your own knowledge that wax paper was in short supply during the whole period from the beginning of the war and the total post-war period?

A. I can't testify that I know that it was in short supply continuously without break.

Q. Do you know the periods that it was in short supply?

A. I think it was in short supply—it has been recently, during the year of 1950, and I believe, certainly during the war years it

was in short supply. I am speaking now from what I have learned from customers and not with any particular knowledge of the production of wax paper.

Q. Was wax paper in short supply in 1947, from your own knowledge?

8969 A. I can't answer as to that particular year, Mr. Renninger, no.

Q. Was it in short supply during the year 1948?

A. I can't answer that either.

Q. Was it in short supply in the year 1949?

A. I believe it was.

Q. Do you know?

A. Not for absolute certain. I know only what I have learned from customers.

Q. Let us take glassine. Was glassine in short supply in 1947?

A. I think it was, yes.

Q. Do you know whether it was?

A. Not from the standpoint of glassine production figures, I don't, no.

Q. Do you know whether glassine was in short supply in 1948?

A. Customers have told me it has been.

Q. But you don't know from your own knowledge?

A. Not from my own knowledge of their order rate and production; no, sir.

Q. What customers have told you that glassine was in short supply at this time?

A. Oh, there have been several cracker bakeries who have said so.

Q. What are their names?

8970 A. I think one that I can recall particularly is the Union Biscuit Company, down in St. Louis, Missouri.

Q. And the others?

A. Not that I can recall by name; no, sir.

Q. But they told you that glassine was in short supply in 1947; is that right? Or 1948?

A. No. 1949, you asked me, didn't you?

Q. 1948.

A. No; I am speaking of 1949.

Q. They told you that glassine was in short supply in 1949?

A. That was my understanding, yes.

Q. What about 1948?

A. I can't answer that.

Q. What about vegetable parchment?

A. I can't answer that either.

Q. For any years?

A. No.

Mr. RENNINGER. That is all.

The COURT. You are excused, Mr. Smith.

Mr. GESELL. Your Honor, in accordance with the understanding we all had, we have excused the witnesses because we felt we would be so near the adjournment.

The COURT. Then you want to adjourn for the day?

Mr. GESELL. Yes, your Honor.

8971 (At this point the trial was adjourned to Wednesday, April 9, 1952, at 10 o'clock, a. m.)

* * * * *

8973 WEDNESDAY, APRIL 9, 1952, 10:00 O'CLOCK, A. M

Present: As before noted.

Mr. GESELL. We call Dr. F. H. Reichel.

FRANK H. REICHEL, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Mr. GESELL. If your Honor please, Dr. Reichel is Chairman of the Board and President of the American Viscose Corporation, Dupont's major cellophane competitor. He appears here pursuant to subpoena. He was connected with Sylvania in an important executive capacity from its organization until its merger with American Viscose, and of course since then he has followed cellophane as President of American Viscose.

His testimony will cover a variety of subjects. He will first discuss the circumstances under which Sidac, the Belgian cellophane company, enabled Sylvania to enter the cellophane business. That will bear on Dupont's alleged exclusion of Sidac's competition and the importance of the La Cellophane technology. He will next deal with Dupont's moistureproof license, particularly the royalty provisions, and he will cover other matters such as prices and a variety of issues that are raised by Paragraphs 34 and 35 of the complaint.

8974 Direct examination by Mr. GESELL:

Q. Mr. Reichel, may we have your full name for the record, please?

A. Frank H. Reichel.

The COURT. Excuse me. Will you please tell us the Paragraphs again, Mr. Gesell?

Mr. GESELL. Paragraphs 34 and 35 of the complaint. There are also, your Honor, various Paragraphs of the Government's trial brief, particularly 98, 109, 129, and 179.

By Mr. GESELL:

Q. You are Chairman of the Board and President of the American Viscose Corporation, are you not?

A. I am, yes, sir.

Q. Where did you receive your professional training, Dr. Reichel?

A. I did my college work at Allegheny College, Meadeville, Pennsylvania; I did one year graduate work there; then I did a year of graduate work at Harvard University, receiving my Master's Degree; and in 1920 to 1922 I studied first at Geneva, Switzerland, the University of Geneva, receiving a Doctor of Science degree there, then later did some special work at the University of Berlin.

Q. Your graduate training was in the field of chemistry, was it not?

8975 A. It all was, that is right.

Q. Prior to becoming President of American Viscose you were connected with Sylvania, were you not?

A. I was President of Sylvania.

Q. Can you tell us when Sylvania was organized?

A. April 1929.

Q. When did you become connected with Sylvania?

A. January 1, 1929.

Q. Prior to its organization?

A. Prior to its organization.

Q. What position did you hold in Sylvania at the outset? What were your responsibilities?

A. I had charge of production, as well as research and development.

Q. When did you become President of Sylvania?

A. Spring of 1938.

Q. During what period of time were you a Director of Sylvania?

A. I was made a Director some time prior to that, but not very long prior. I just don't recall the date.

Q. When was Sylvania acquired by American Viscose?

A. Well, the actual closing was the 12th of September 1946.

Q. Had you previously been connected with American Viscose in any way?

8976 A. Yes, I was a Director from the Spring of 1944.

Q. After American Viscose acquired Sylvania, what position did you have in American Viscose?

A. I was first Chairman and chief executive officer from the first of July, and then in September the President resigned, I think, and I took that title also.

Q. Since American Viscose acquired Sylvania, have you kept in touch with cellophane matters?

A. To some extent, naturally.

Q. What other products does American Viscose make?

A. Its major products are viscose filament yarn, acetate yarn, viscose staple fiber, and viscose tire yarn, and cellophane.

Q. Where are its plants located?

A. Marcus Hook, Lewistown, Meadeville, Parkersville, Nitro, West Virginia, Roanoke, Virginia, Front Royal, Virginia, and Fredericksburg.

Q. To give us some idea of its size, can you tell us approximately what were its gross sales and assets as of the last year?

A. Its sales are around 270 million, both 1950 and 1951.

Q. And its assets?

A. And its assets are roughly 200 million dollars, I would say.

8977 Q. How many employees approximately does it have?

A. 21,000.

Q. Does it have a research and engineering organization?

A. Yes, it does.

Q. How extensive and of what character is it?

A. We spend for research and development around four million dollars.

Mr. GESELL. Your Honor, I am going to have a series of questions, and I want to be sure that both the Court and the witness understand one term that I am going to use. Paragraph 18 of the complaint, the last sentence, says that whenever the term Sylvania is hereinafter used with reference to events transpiring subsequent to the date of the acquisition of Sylvania by American Viscose, it will mean the Sylvania Division of the American Viscose Company.

By Mr. GESELL:

Q. I am going to use the word Sylvania, Dr. Reichel, throughout, but insofar as I am covering events subsequent to that I mean to include by that American Viscose. Do you understand?

A. Yes.

Q. Dr. Reichel, who was Dr. Wallach, if you know?

A. In relation to Sylvania, he was the founder of Sylvania. My first association with Dr. Wallach dates back to 1918.

At approximately the same time, he succeeded me by
8978 about two or three weeks, we were with,—he as Plant Manager and I as Chief Chemist,—at the old West Works, at that time owned by the Grasselli Chemical Company.

Q. When was that?

A. He went there in May 1918 and I went there in June of 1918. We were associated except for a period of two years after that part of Grasselli was acquired by I. G. Farben,—except for a two-

year period, we were associated from 1918 until Sylvania was founded, in 1929, a period of eleven years.

Q. Was he trained in chemistry?

A. He was trained in chemistry; that's right. He had a Doctor's Degree from the University of Mulhause, in Alsace.

Q. Is Dr. Wallach alive?

A. No.

Q. When did he die?

A. He died December 7, 1941.

Q. After the formation of Sylvania and until his death, how closely did you work with him on affairs of Sylvania?

A. Well, closely, very closely, in one way. No so closely in another. In that having been associated for so many years, the result of that was complete confidence in each other; so he operated rather independently in his own sphere and he permitted me in mine. Of course, during that period I had charge of the plant and research, and he let me do that pretty much as I thought
8979 best. However, he did keep me informed about what he was doing.

Q. Next to Dr. Wallach, who was the highest officer of the company?

A. H. H. Replogle, who had charge of sales. He and I were the two Vice Presidents of the company. He had charge of sales and I had charge of production.

Q. Will you relate the circumstances under which you became associated with Sylvania? You say you were with the company prior to its organization.

A. In 1924 or 1925,—1925, I believe it was,—Grasselli sold its dye stuff division to I. G. Farben. The result of that was that the research work and development work, which was my job at Grasselli, was greatly changed, because it became then a matter of modifying the German processes to make them more adaptable to American conditions. The headquarters for the research work was in Germany, so we were handed completed processes and formulae. It is true we had to do some work on them, but the type of work changed. Then, too, it was a matter of working for a German company rather than an American company. The officers of the company were of course German. So at the end of 1926 I was offered a position as Assistant Superintendent of Charles Speiser & Company, of Brooklyn, who are of course well known as—originally it was the most important manufacturers of citric acid and now of penicillin and quite a number of antibodies.

8980 During the two-year period that I was there, Dr. Wallach, who had continued on with the General Dyestuff—then the Germans had changed the name to General Dyestuff—he be-

came somewhat dissatisfied with the situation as it was and was thinking about making a change. So we had luncheon together in the Fall of 1928, in the old Lafayette Hotel in New York, and he told me about this cellophane idea of his, and had the thought that we might, if we could organize the business and raise the necessary capital, and make an arrangement with some company abroad, such as Dupont did, that he thought it had a very bright future, and it would be a grand thing for both of us.

In the meantime, during the few years I had been at Speiser's, the organization plan that they had in mind when I went there could not quite be carried out because of unforeseen circumstances, so that I was ready and willing to consider making a change. So the idea was that he would live in New York and I would be wherever the plant might be and have charge of plant operations, he would have charge of sales and other matters, he would be President and chief executive officer, and together we would handle the two parts of the business. That was the beginning.

Q. Did you subsequently obtain a process and technology from abroad?

A. Yes, we did.

8981 Q. And what was that process that you acquired?

A. Well, that was a cellophane process that was being used by Sidac which had a plant at Ghent, Belgium.

Q. Where had Sidac obtained the process?

A. Well, we always understood that they had gotten their process from the French company.

Q. What was the name of that company?

A. Comptoire, I believe.

Q. Who were Sidac? What was that company? You say they were manufacturing at Ghent.

A. Well, the full name of the company was Societe Industriel de La Cellulose, and they cut it down and called it Sidac, as is the custom in Europe.

Q. Who were the officers at Sidac?

A. Well, there was a man by the name of Vleurinck, and then there was a Belgian by the name of Van Campenhout who was one of the Directors; then there was another Director, a Belgian by the name of Van Ham; Ernest Bleibler was General Manager, and a fellow by the name of Ray was Sales Manager. It was really Ray and Bleibler that had been employed at this French cellophane company and had gone to Belgium, and it was my understanding they got these other people to put up the money and get the business started.

Q. Were you able to arrange a contract with Sidac?

A. Yes.

8982 Mr. GESELL. Will you mark this Defendant's Exhibit 999 for Identification?

(The paper headed "Agreement between Sylvania, Sidac, and Interchimic" was marked "Defendant's Exhibit No. 999 for Identification."

Q. Dr. Reichel, I show you a six-page document headed "Agreement" which has been marked in this case as Defendant's Exhibit 999 for Identification, bearing the designation in the lower right-hand corner "Syl 3-14 5/27/42" and Mr. Minicus' initials, between Sylvania, Sidac, and a company known as Interchimic, and ask you whether that is the English translation of the agreement which Sylvania made governing the terms and conditions under which Sylvania got rights to processes and financing with which to start up this business?

A. I would say it was. I have no way of saying whether it conforms perfectly to the original signed contract, but it seems to me that it is the contract.

Q. Do you recognize that as a document that came from your company's files?

A. Yes.

Q. The original of the contract was in French; was it not?

A. That is right. The three men that signed that were Van Campenhout, Van Ham, and Vleurinck.

Q. Who signed it for Sylvania?

8983 A. Roger Wallach.

Q. Who is the third party to this contract?

A. Interchimic. I don't know whether I know too clearly just how this company fit into the picture, but my understanding always was that they were a holding company and the original financing of Sylvania was handled by this Interchimic Company which was later dissolved, some years later. I don't know the date. I would say 1936, 1937, or 1938, some time later on.

Q. Do I understand that this agreement was carried out and put into execution?

A: Yes, sir.

Mr. GESELL. I offer the contract in evidence.

Mr. MINICUS. Objection, your Honor. The Government feels the contract is immaterial to the issues of the case.

Mr. GESELL. Will your Honor look at a copy of the contract so that I can indicate its relevance?

Mr. MINICUS. The Government had this contract for many years. I could not see any materiality to the issues of whether Dupont had monopolized the cellophane industry or not.

Mr. GESELL. That is the most extraordinary concession we have had in this case yet, your Honor, that the Government had this

contract in their possession for many years and did bring it forward to the Court, because I intend to show the relevance and materiality of this contract. Your Honor——

8984 Mr. MINICUS. Mr. Gesell——

Mr. GESELL. Please don't interrupt me.

If I may go forward now, I will indicate it to the Court.

Mr. MINICUS. May I explain, your Honor, that Mr. Gesell acquired this contract from the Government under order of the Court We pointed out to the Court in the District of Columbia at the time—I believe it was there—that we had certain contracts and papers of the Sylvania Company which was the other manufacturer in the field, and we didn't feel that we should give them up unless we were under express order of the Court, and that is how Mr. Gesell came into custody of these Sylvania documents over our objection. We considered them at length. The means by which Sylvania came into this business in the United States I can't see have anything to do with Dupont's monopolization. Dupont is not mentioned in that agreement. There is absolutely no connection with the case.

Mr. GESELL. Your Honor, this contract is relevant in four respects.

First, the Government asserts in this Court and has asserted from the outset of the trial that Sidac was a potential competitor whose competition was suppressed by Dupont, and it is alleged that the lack of imports by Sidac, among others, was a direct result of the monopoly which they are charging. Now, here is a contract

8985 made between Sylvania and Sidac for the licensing of processes and technical information under which Sidac binds itself for thirty years not to sell into the United States, and we have just had Mr. Minicus' concession that Dupont had nothing to do with the contract. So, number one, the contract explains why Sidac did not sell in the United States and refutes the assertions of the Government that Sidac was a potential competitor whose competition was suppressed by Dupont. That is its first relevance.

Mr. MINICUS. If I may correct that one, your Honor, I didn't say that Dupont had absolutely nothing to do with this contract. I said Dupont was not in at the execution of this contract. They are not mentioned in the contract, and if the contract becomes material I think it is up to the defendant to lay a foundation of how Dupont had something to do with this contract.

Mr. GESELL. They have told your Honor throughout this trial that Dupont kept Sidac out of the United States, and here is a contract entered into by Sidac and Sylvania, unknown to Dupont, under which Sidac agreed to stay out of the United States; and I charge that their failure to bring that to the Court was a failure to disclose a highly significant and material fact in this case.

Now, second, we have had constantly the question as to where this technical information came from, and the proof now
8986 shows that Mr. Bleibler and Mr. Ray, the operating officials of Sidac, who earlier testimony showed had been key officials of the La Cellophane Company, left La Cellophane and formed Sidac; and I intend to show that those gentlemen came here and established the Sylvania plant.

So it is material as to the availability of technical information and what the technical information was.

Third, the charge was repeatedly made in this case that this technology was neither secret nor of any commercial value whatsoever, and here is a contract entered into by Sylvania with Sidac under the terms of which, as we will show, very significant and important sums of money were paid for the secret process and technical information which was maintained confidential.

Mr. Minicus stated to the Court, for example, at 242 of the record that Sidac had no difficulty starting their own process; it was perfectly clear; anybody could go into this business; and here we come forward with this contract which he never came forward with that shows how, shows when, shows where, shows what was paid for it, shows where it came from.

It is also relevant, it seems to me, finally as to the general methods and practice of doing business in the licensing of technical processes and secret information which bears on the bona fides and significance of the La Cellophane contracts which are under attack here.

So on all those grounds I say it is highly relevant
8987 and material.

The Court. I am going to admit Defendant's Exhibit 999 for Identification on reasons one and three as urged by you.

(The agreement between Sylvania, Sidac, and Interchimic previously marked "Defendant's Exhibit 999 for Identification", was received in evidence and marked, "Defendant's Exhibit No. 999.")

By Mr. Gesell:

Q. Now, Reichel, you said that the contract was carried out. Will you tell us what was done pursuant to the contract in setting up the original Sylvania plant which, I believe, was at Fredericksburg, Virginia?

A. That is right.

Q. That still is the only cellophane plant American Viscose has?

A. That is right.

Q. Were you there at the time?

A. I selected the site.

Q. What did you do after the site was selected? What responsibility did you have?

A. I had charge of construction of the plant.

Q. Will you tell us what assistance and cooperation you received in the construction of a plant under this Sidac license, Exhibit 999 in evidence?

8988 A. After the financing had been arranged, which was handled in some way between Dr. Wallach and this Interchimic Company, Carl De Moll, who was one of the partners of the Ballinger Company, architects and engineers of Philadelphia, and I went over to Belgium, and we were there approximately two months. While we were there they gave us all their building plans so that when he came back he could put the Ballinger organization to work, and the first units at Fredericksburg were almost identical—the building construction was almost identical with the plant in Belgium. Then after the plant was built they sent their own people over, including Ernest Bleibler himself, and he put the machinery in operation. But we received from them not only the machinery plans, the viscose layout, type of slitters to use, complete know-how, and after we had all that, they came over at the starting of operations.

Q. How many people came over with Mr. Bleibler?

A. Three people at the time. One was the casting room foreman. They erected the first casting machine, so their erection foreman came over, and then Bleibler came over himself.

Q. Where were the machines acquired?

A. The entire first machine was acquired in Belgium. They built the first machine completely, and most of the second.

Q. How long did it take to construct the plant, using
8989 these blueprints and plans and designs and know-how?

A. We started construction the end of August and we were in production the 10th of June, the following June.

By the COURT:

Q. What year was that, Doctor?

A. We started construction August 1929, the end of August 1929, and we were in production June 1930.

Q. Then your plant preceded the Richmond plant of Dupont?

A. I suppose so. I don't know.

The COURT. Is that the fact?

Mr. GESELL. I think that is right, your Honor. I think we were only up in Buffalo.

By Mr. GESELL:

Q. The contract was in April, you started construction in August 1929, and you finished in the Spring of 1930?

A. June, yes; the 10th of June, 1930.

Q. You say that you obtained the complete know-how. What did you mean by that?

A. What I mean by that is that they disclosed everything that they knew. I mean there was no holding back of anything.

Q. Were you under any instructions with respect to maintaining the secrecy of this information?

8990 A. I don't know about instructions, but we always considered it a resr onsibility to keep it secret. We never even permitted our own sales representatives to see our plant.

Q. And you did maintain it secret?

A. Yes.

Q. Have you kept it secret up to the present time?

A. Yes.

Q. I hand you a copy of a Exhibit 999 and ask you to refer, if you will, to Article 6, which appears on Page 4. With that before you, Dr. Reichel, will you tell us——

Mr. MINICUS. If we could have a copy of the defendant's exhibit, your Honor?

Mr. GESELL. You just said you had it since 1942.

Mr. MINICUS. We don't bring everything we have to Court with us. It is usually courteous for counsel to provide one, Mr. Gesell, if you haven't heard.

Mr. GESELL. He is very edgy this morning, your Honor.

By Mr. GESELL:

Q. Having Article 6, Page 4, before you, and directing your attention to that, will you tell us how the parties evaluated the exclusive rights to the patents, processes and know-how which were obtained pursuant to the contract?

A. For the whole package they received 200,000 shares of Sylvania stock, the subscription price of which was seventeen
8991 dollars and a half a share. It is a matter of judgment, of course, as to just how that should be divided, but I always felt that certainly 150,000 of those 200,000 shares should be attributed to the know-how and the patents.

Q. What is the value of those 150,000 shares?

A. It would be about somewhere around nine times 150,000, which would be around a million and a quarter, I would say, roughly.

Q. Around a million and a quarter dollars?

A. Yes.

Q. Were they patents of any particular value?

A. The patents were not relatively as valuable as the know-how.

Q. Dr. Reichel, to your knowledge did Dupont have anything to do with this contract whatsoever, with its negotiations or with its execution or with its terms?

A. No, none whatsoever.

Mr. MINICUS. I have an objection at this stage, your Honor. The contract, at the bottom of Page 4, is in direct contradiction of the witness' testimony.

Mr. GESELL. Why doesn't he cross-examine him when he gets his turn, your Honor?

Mr. MINICUS. This is a direct misreading of the contract. If you look at it, your Honor, you will see that Section A, at the bottom of Page 4, there, says 100,000 shares for the patents
8992 and the patent applications, and the other hundred thousand shares is for the exclusive territory, and there is no mention of the process.

Mr. GESELL. You didn't turn to the next page of the contract, Mr. Minicus.

The COURT. The first paragraph on Page 5.

Mr. GESELL. That says precisely what the witness said.

Mr. MINICUS. But the witness testified, your Honor, that the patents were not as valuable as the process. It says a hundred thousand shares for the patents and then a hundred thousand shares for the process, and some other things. It is a direct misreading of the exhibit.

The COURT. I am going to allow the question to stand. If you think you can break that down on cross-examination, you may do so, for the assistance of the Court.

By Mr. GESELL:

Q. At the time you started, Dr. Reichel, was there know-how and engineering information available in the United States with respect to the commercial manufacture of cellophane?

A. No.

Q. With respect to maintaining the secrecy of the information, you have already testified that the contract has continued in force and effect. Did it remain in force and effect with respect to the exchange of technical information?

8993 A. Yes, it did.

Q. Did it remain in force and effect with respect to territories?

A. We never observed the territorial restrictions of the contract.

Q. But in other respects the contract is still in force and effect; is that right?

A. That's right.

Q. Did Sidac license British Sidac and Italian Sidac under this process at a later date?

A. Yes, they did. I never saw the contract. I don't know what the details are.

Q. In connection with your operations at the beginning or at any subsequent time, did you ever receive any technical information from Dupont?

A. No.

Q. Have you ever been in a Dupont cellophane plant, Dr. Reichel?

A. No.

Q. I wish to direct your attention, Dr. Reichel, to two exhibits which have been tentatively admitted in this case, Defendant's Exhibits Nos. 515 and 516, and ask your whether you recognize those to be circulars which were sent out to the trade as indicated by these exhibits by Sylvania?

8994 A. I could answer the question this way, that I am quite certain they were sent, and they were in line with what would have normally been done.

Q. Who was Birn and Wachenheim?

A. They were the Sidac agents in the United States prior to the formation of Sylvania.

Q. Did you supplant them in the business of importing Sidac fenestra on or about the date indicated by this Exhibit No. 515?

A. I think we did, yes.

Q. Did Sylvania, Dr. Reichel, make caps? Cellophane caps?

A. At one time, for a while, until they became obsolete.

Q. From what source did you get, if there was any source, the technology and information to make viscose caps?

A. From Wolff & Company, Germany.

Q. Now I want to change to a slightly different subject, Dr. Reichel. I take it you recall that there was a patent suit brought by Dupont against Sylvania relating to the infringement by Sylvania of the moistureproof patent of Dupont?

A. That's right.

Q. Did you personally participate in any way in negotiating the settlement of that patent dispute which led to the moistureproof patent license agreement?

A. No.

Q. Who negotiated the contract on behalf of Sylvania?

8995 A. Harry Peffer and Roger Wallach.

Q. Who was Harry Peffer?

A. Harry Peffer was originally a Director, one of the original Directors, of Sylvania, and later was Chairman of the Executive Committee of Sylvania.

Q. Is he alive or dead?

A. He recently died.

Q. In connection with the settlement of the patent suit, was your advice sought by Dr. Wallach or others in the company with

respect to whether or not you should settle, and did you in that connection give any advice?

A. That has been a long time, it has been twenty years, but I am sure as a matter of principle it was my advice to settle.

Q. You say it was your advice to settle. Why did you advise that the suit be settled?

A. There again it is a matter of principle. We had been successful in getting around all the Dupont patents and all their claims except one basic product claim which claimed a transparent moistureproof wrapping material, and of course we only had so much money at the time; there is always a risk in a patent suit, you never quite know how it is going to turn out; so there was another reason. In getting around patents very often you have
8996 to adopt a process that is a little more expensive to operate, and that was true in this case. So that I am sure my feeling at the time was that it would be better to make a settlement on a reasonable royalty basis than continuously to pay the penalty of a somewhat higher cost. So one was sort of an offset to the other.

Q. In what respect was your process more expensive?

A. In the Dupont patent, the paraffin wax, which is the moistureproofing agent or moistureproofing ingredient,—the paraffin is dissolved in the lacquer, when the lacquer is made. We could not do that. We applied the paraffin as a dust, very finely divided. The static charge on the sheet tended to draw the particles to the sheet. We produced a very good product, but it was more difficult to control and it did not permit us to run our machines quite as fast as you can operate under the Dupont method.

Q. Now I want to discuss with you the provisions of the contract as they relate to royalties. Did those royalty provisions, Dr. Reichel, at any time prevent Sylvania from expanding or increasing its production?

A. No.

Q. Were those royalty provisions ever discussed within Sylvania by you or by anyone else in your presence as being a limiting factor or an impediment upon your ability to produce and expand?

A. No.

Q. Did you ever manufacture a quantity sufficient to
8997 require you to pay the additional royalties provided in the agreement?

A. No.

Q. Following the cancellation of those provisions, did your practices or policies with respect to expansion in any way change?

A. No.

Q. Was Sylvania able to sell the entire output of its plant?

A. Yes.

Q. At all times, Dr. Reichel?

A. At all times.

Q. Were you in an oversold or undersold position most of the time?

A. Oversold.

The COURT. What does that mean?

By Mr. GESELL:

Q. What do you mean by oversold, Mr. Witness?

A. When you have more orders than you can fill.

Q. If you had more orders than you could fill, why didn't you expand more and put in more capacity to meet those orders?

A. We expanded right fast, and after all we only had so much money, and back in the thirties it was not the vogue as it is now to borrow a lot of money, it was not so easy;
8998 we didn't have the institutional investiture that we have now to go to borrow money. And of course those were depression years. In 1938 we did at one time borrow a million dollars, which doesn't seem much today, but it was substantial in 1938. It was really all that Sylvania should have undertaken. It would not have been advisable at that time to have sold more stock. And I think that over those years our record for expansion was not too far from our competitors' record. I mean our percentage ran along about the same. I think we expanded about as fast as we could afford to expand.

Q. Why couldn't you afford to expand more? Wasn't Sylvania making money? Didn't it have a lot of earnings that it could plow into this business?

A. No; we had a very conservative dividend policy, and we plowed back all that we felt we could. We put it back in the business, as our borrowing in 1938 indicated.

Q. Why didn't you have more earnings that you could plow back?

A. Well, after all, there are only so many dollars available from a certain amount of sales, and it costs a lot of money to install cellophane capacity. It is one of the most expensive products there is.

Q. Were you putting all of your money into cellophane?

A. That of course is another story. We had some very substantial reputable bankers, of course, on our Board, and
8999 back during the thirties, if you remember, the word diversification was on everybody's tongue, and any company to be strong and to be desirable from an investor's standpoint, it was terribly important that they diversify. So we sort of branched out on a diversification policy and got into quite a few other things, which of course used money too.

Q. What were some of the things you went into?

A. Well, you mentioned one, viscose caps, which turned out to be a dud. And then we went into artificial horse hair, which also turned out unsatisfactorily. And we went into viscose staple fiber, which was a good item, but we decided not to continue in that field. We went into sausage casings. We went into rubber thread. We went into a permanent textile finish.

Q. Were those successful ventures, by and large, or did they——

A. No, not by and large. The casings has been reasonably successful.

Q. How did you finance those ventures during the thirties?

A. Well, they were also financed out of earnings.

Q. Dr. Reichel, the Anti-trust Division has contended in this case that because you were not in a position to know what your percentage was in relation to the total production and therefore not know how near you were approaching the
9000 point where you would have to pay additional royalties, that the nature and form of the restriction imposed upon Sylvania's sales rendered the permissible upper limits of its moistureproof production highly problematical and the great hazards involved in over-production dictated a policy of curtailment on Sylvania's part. What have you got to say about that?

A. Well, that is not so, because we always knew how we stood.

Q. How did you know?

A. We were told.

Q. Who told you?

A. I would say probably generally John Hatt, who was Manager of the Cellophane Division of Dupont.

Q. Did you ever have a policy of curtailment?

A. No.

Q. Were you ever conscious of a hazard, a great hazard, involved in over-production?

A. No.

Q. Do you recall anytime, Dr. Reichel, at any point in this period, that you in any way had your plans for expansion or production affected by the existence of this moistureproof license agreement?

A. No.

Q. It has also been suggested here, Dr. Reichel, that it took eighteen months to install additional capacity and that
9001 it was a very uncertain period and you would never know how you stood eighteen months away and therefore you could not go ahead. What have you got to say about that?

A. It may take eighteen months now, but I think the answer to that is what I already said, that we started with an open field in August and we were in production the following June; and

during this period of the thirties, when it was easy to get material and easy to get help, up to 1941 or 1942, or *1942*, when we were really in the war, it was possible to increase your capacity in, I would say, a matter of six to nine months.

Q. How would you do that?

A. That usually just involved adding on to existing buildings and adding additional equipment all along the line. These plants are built in units and you just add another unit on to the present one.

Q. Did you and your associates feel, Dr. Reichel, at this time, that the amount of the royalty which would be payable after you reached the specified percentage in the agreement was such as to make production over that point unprofitable?

A. I don't think we ever thought about that. We had no reason to.

Q. Did you ever have occasion to ship to Canada?

A. Yes, we shipped some to Canada. Not a great
9002 deal. We shipped some to Canada. We shipped some to South America.

Q. I next want to come to the subject of prices. It is charged in this case in Paragraph 35 of the Complaint, Dr. Reichel, that from time to time Dupont had understandings with Sylvania regarding the prices and discounts on cellophane and caps and bands, respectively. What have you got to say about that? Is it true or false?

A. I would say that was false. Certainly to my knowledge there was never any understanding of any kind.

Q. Did you ever discuss prices?

A. Never.

Q. With the Dupont people?

A. No, sir.

Q. Did you have advance knowledge of Dupont's price plans?

A. No.

Q. Now, it is also suggested and stated in the Complaint in the various submissions by the Anti-trust Division that when Dupont reduced the price of cellophane and you were obliged to follow that that had the effect of suppressing your ability to compete. What have you got to say about that?

A. We never felt that we

Q. Why not?

A. Well, while Dupont was improving their technology, which made these price reductions possible, we were also im-
9003 proving ours, so that these price reductions always appeared to us as perfectly normal and proper in an expanding business.

Q. What effect did they have, if any, on your business?

A. The only effect we always felt it had was to stimulate the business.

Q. What do you mean stimulate the business?

A. Well, with each reduction there was always potential new uses that would come into play, new possibilities, and that has proved.

Q. Now, in this case, Dr. Reichel, the Government contends that Dupont, Celon, and Sylvania formed a combination of all of the owners of virtually all the United States patents relating to bands, and that that combination was motivated to preclude access to those patents by strangers to the combination who might otherwise constitute potential competition. What have you got to say about that?

A. I know of no such discussion or arrangement.

Q. Did you ever hear of any understanding or arrangement between Dupont and yourself involving or not involving Celon to get together on patents to strangle or prevent potential competition?

A. I never heard of anything of that kind.

Q. Now turning to another subject, the Government contends that American Viscose Corporation, of which you are now President and Chairman of the Board, was excluded from
9004 the cellophane business by an agreement or conspiracy between Dupont and others. Since you have been connected with the American Viscose Company did you ever hear of any such agreement or do you know of any such agreement or arrangement?

A. No, not since '44.

Q. Were you a member of the Board at the time the discussions took place with respect to acquiring Sylvania?

A. Yes.

Q. Was that question ever discussed at the Board meetings of American Viscose?

A. No.

Q. It has been suggested by the Government that Dupont took the position that it did not want three competitors in this business making cellophane; it only wanted itself and one other, and that Dupont said as between Sylvania or American Viscose it would rather have American Viscose. Did you ever hear of such a thing?

A. No.

Q. Dr. Reichel, the Government contends that since Sylvania's entry into the business and in its operations in later years that

Sylvania was beset by suppressive tactics instituted by Dupont. Are you aware of any suppressive tactics against your business by Dupont?

A. No.

Q. Does Sylvania compete with Dupont, Dr. Reichel?

9005 A. Sure.

Q. Have you been able to compete as to customers?

A. Yes.

Q. What about your ability to compete as to research?

A. I think we have done very well.

Q. Do you feel you have been able to compete as to customer service?

A. Yes.

Q. Did the royalties you had to pay under the moistureproof patent license agreement in any way affect your ability to compete?

A. No.

Q. As Sylvania grew and expanded and developed over these years, Dr. Reichel, did you experience any difficulty in obtaining converter outlets for your product?

A. No.

Q. What was your experience in that regard?

A. Well, we had some converters of our own. Daniels Manufacturing, for one. We had part of the business from some of the others. But over those years we had no problem or difficulty in selling to outlets where there was no converter discount. Converters have always received a substantial discount. It was part of the business policy of the industry. So that the converter problem with the converters we had was never a barrier, we felt, to selling our production.

9006 Q. Were you interested in promoting converter business or direct user business?

A. My preference was direct user business.

Q. Has Sylvania operated at a profit so far as its cellophane operations are concerned?

A. From the beginning.

Q. Is Sylvania expanding?

A. Yes.

Q. What are your future plans with respect to expansion?

A. Well, the present program is to increase our capacity to one hundred million tons.

Q. Has that been approved by the Board?

A. Yes. It is well on its way.

Q. With respect to your efficiency, over-all production efficiency, has it increased or diminished or stayed still over the years in your opinion?

A. I think it has improved somewhat since the merger with Viscose in some places.

Q. It is charged in this case, Dr. Reichel, that in about 1932 an agreement was made between Dupont and Sylvania that in lieu of prosecuting patent infringement suits under the color of a cross-license agreement an exclusive patent pool would be created to dominate the manufacture and sale of moistureproof cellophane, and that the purpose of that agreement and the effect of that
9007 agreement have been to restrict the competitive activities of existing manufacturers and to exclude potential competition. Are you aware of Sylvania's ever having made any such agreement for such purposes?

A. No.

Q. At the time the moistureproof license agreement was entered into was there any agreement or understanding between Dupont and Sylvania other than contained in the four corners of that agreement?

A. Not so far as I know.

Q. Were the subsequent settlements of patent interference suits which were made in two or three cases made individually or pursuant to some broad understanding to pool patents?

A. I think the record shows they were made individually, and I think the record will also show that we handled those cases in exactly the same way we would have handled them if anybody else was involved other than Dupont.

Q. Did Sylvania ever ask for licenses under any of Dupont's cellophane patents for the purpose of preventing others from practicing the patents?

A. No.

Q. To what extent were you familiar with the patenting and research aspects of Sylvania?

A. I feel that I was completely familiar with them.

Q. Did that come within your particular jurisdiction?

A. It did, yes.

9008 Mr. GESELL. May I have just a moment, your Honor?

The COURT. Yes.

Mr. GESELL. That is all, your Honor.

Mr. MINICUS. Your Honor, we consider the testimony of this witness extremely important, and for that reason I am going to request our mid-morning recess at this time and ask if it could be for twenty-five minutes or twenty minutes.

Mr. GESELL. That is all right with me.

The COURT. All right. Recess for twenty minutes.

Mr. MINICUS. Thank you, sir.

(At this point a brief recess was taken.)

Cross-examination by Mr. MINICUS:

Q. Dr. Reichel, with regard to the exhibit that the defendant put in this morning, I believe it was offered as Defendant's Exhibit 999, did you state that 200,000 shares were issued, and these were to be divided, and you would say that 150,000 of the shares was appropriated for the know-how, and the know-how was worth more than the patents? Is that a reasonably accurate statement of your testimony?

A. Yes.

Q. Do you have a copy of the exhibit available, sir?

A. No, I do not.

9009 Mr. GESELL. I can give him one so that he can follow it.

By Mr. MINICUS.

Dr. Reichel, will you kindly turn to Page 4, under Article 6, sub-heading A? Does it not say there that 100,000 shares are as remuneration for the above patents and patent applications?

A. Yes, that is what it says.

Q. That leaves 100, shares out of the 200,000 we had originally; is that correct?

A. That's right.

Q. Did you hear Mr. Gesell state to the Court this morning that this agreement typified the kind of agreement that businessmen were making with their European associates during this period of time? Did you hear a statement to that effect?

A. Something like that, yes.

Q. Now will you look at sub-heading B, Dr. Reichel? Does it not say there that the other hundred thousand shares are as remuneration for (Figure 1) granting to the American company the exclusive right to manufacture and sell said production in the above-mentioned territories?

A. Yes.

Q. That is the first statement, is it not, sir?

A. Yes.

Q. So part of the remaining 100,000 shares is stated

9010 to be in here for the exclusive market. Then (Figure 2) does say, for disclosing to the American company secrets of manufacture? That is in there, is it not?

A. Yes.

Q. As well as other rights and privileges. Do you know what the other rights and privileges might have been, sir? And then for this——

Mr. GESELL. Now wait a minute. Isn't there a question pending?

Mr. MINICUS. The witness answered, I believe.

The COURT. I didn't hear him.

Mr. GESELL. I didn't hear him.

Mr. MINICUS. I am sorry, sir.

The WITNESS. Well, other rights and privileges, I don't know exactly what that means.

By Mr. MINICUS:

Q. Now there seems to be a third element of consideration also recited here, and that is for the intervention by Interchimic, which I believe assisted in the subscription of capital to get the organization started; is that right, sir?

A. That's right.

Q. So that as a matter of fact, for one-half of this consideration of 200,000 shares, to-wit, 100,000 shares, there were three elements of consideration moving the other way; is that not correct, sir?

9011 A. You have to, of course,—what you have here is the written contract. Actually I know that—or at least I am sure that much of that hundred thousand shares which is under the heading for patents and patent applications,—that we never considered those patents and patent applications as anywhere near worth the hundred thousand shares. Much of that hundred thousand shares was attributed to know-how.

Mr. MINICUS. I move that the answer be stricken from the record, your Honor, inasmuch as the witness has attempted through the use of parol evidence to modify the express terms of the agreement put into evidence by the defendant.

The COURT. Well, you are examining him on this subject matter.

Mr. MINICUS. That was not responsive to my question. I have one of two alternatives, your Honor, when I see a witness start to answer that way, either stop him or let him finish if the Court seems to prefer and then move to strike.

The COURT. Let me hear that answer.

(The last answer of the witness was repeated by the Reporter.)

The COURT. I think your objection is a valid one, Mr. Minicus.

Mr. GESELL. May I be heard, your Honor?

The COURT. Yes.

9012 Mr. GESELL. This witness examined Article 6 on direct examination and stated that of the 200,000 shares there shown he considered 150,000 to be for patents and for know-how. Now he has been asked whether all of the know-how was not contained in the second hundred thousand shares, and his answer responsive to that question was no, that he considered some of it under (a), which related to patents. Now certainly——

The COURT. There was no objection by Mr. Minicus as to that line of interrogation, and therefore I was not going to intervene

and object, certainly, but I think if he had I would have sustained his objection to your question along that line. I don't see how you can modify the written instrument by the words. I mean I can't think of a more apt example of the parol evidence rule.

Mr. GESELL. Well, we are not concerned here.——

The COURT. I think you were lucky in getting in what you got in without objection.

Mr. GESELL. We are not here, your Honor, concerned with interpreting a contract. That is not the issue before the Court. The issue before the Court is what was the value of the know-how and processes to an American company embarking upon manufacture in the United States, and the witness certainly is entitled to state what that value was to the company.

9013 The COURT. He has already stated. You have got it in the record. It is simply repetition. But I think it is a technical objection and it is a sound one. Sustained.

By Mr. MINICUS:

Q. You stated that among the officials of the Sidac were two men who had previously been employed by the Comptoir or La Cellophane; is that right?

A. That's right.

Q. Will you identify them by name?

A. Ernest Bleibler and a man whose last name was Ray. I have forgotten his first name.

Q. Did you ever have any conversations with those gentlemen?

A. Oh, yes. I knew them both. I knew Bleibler quite well.

Q. What was your opinion of their character?

A. Well, not too good because of what they did. They carried off, the story went—and I have never heard it denied—the story went that these two men in the employ of La Cellophane, one was an engineer and one was a salesman, left La Cellophane with a trunk full of blueprints, crossed the border into Belgium, and organized, with the financial help they could get, organized Sidac, using the La Cellophane blueprints.

Q. Is that the process that you acquired from Sidac?

9014 A. Yes.

Q. Were you cognizant of the fact that you had acquired the stolen process from the Sidac?

A. Not at the time.

Q. When did you become cognizant of that fact?

A. Well, a lot of that story came out in the courts in Belgium some time in the thirties. I am not too familiar with it.

Q. Did that case ever come to a conclusion by the court or was it settled outside of court?

A. I don't know.

Q. You don't know then whether there ever was a judgment in the courts of Belgium, deciding that this process had been stolen?

A. There was a trial but I don't know whether it was concluded. I don't know how it was concluded.

Q. So all of your knowledge then comes from information that you have heard about the story?

A. I think it is reliable.

Q. You haven't answered my question. Reliable or not, how did you acquire this knowledge?

A. The only answer to that is from what I heard.

Q. You were manufacturing then in the United States under a process that you believed to be stolen?

A. Not exactly, no. They had been operating there
9015 for—I don't know when Sidac started—they had been operating, I suppose, from '22, or '23, or '24 up to 1929. They had made some improvement, no doubt, just as La Cellophane had in the meantime.

Q. Then the process you were using was not the process that was stolen?

A. I would say that the original know-how and the original design of the casting machine, which is the key to this process, the original design came from La Cellophane. Now, how much it had been changed from the time that they got it from La Cellophane until we got it at Fredericksburg I have no way of knowing. I don't know. I was never in the French plant.

Q. Did Dupont ever make any claim against Sylvania for operating under what it alleged to be a stolen process?

A. I don't know that Dupont ever alleged that it was a stolen process. They never made any claim.

Q. Dupont never made any claim against the Sylvania Corporation on that theory?

A. No.

Q. Did you ever have any conversations with any of the officials of the Dupont Company concerning the so-called piracy of this process?

A. No.

Q. And yet, with the exception of the Dupont Company,
9016 is it true that your corporation was the only other one manufacturing in the United States under this so-called stolen process?

A. That's right.

Q. And no claim was ever made by Dupont against your corporation for operating under this so-called stolen process?

A. No.

Q. Dr. Reichel, are you aware that the defense has placed in evidence in this case a line of testimony designed to establish that the cellophane manufactured by Sylvania has been and is inferior to the Dupont product?

A. No.

Q. You are not familiar with that?

A. No.

The COURT. Let's make that more accurate. In some instances inferior, in other instances Dr. Reichel's product is superior. Is that what is in the record?

Mr. GESELL. That is what the record shows, your Honor.

Mr. MINICUS. I will accept that from the defendant.

The COURT. I didn't want Dr. Reichel to feel that we were offending his product.

By Mr. MINICUS:

Q. Is it your opinion, Dr. Reichel, that users of cellophane purchased almost four times as much Dupont cellophane
9017 because the Sylvania material will not adequately perform according to the buyer's requirements?

A. No.

Q. Then you think the fact that Dupont sells more cellophane than Sylvania Division has nothing to do with the relative quality of the two materials?

A. I would say that is true at the present time.

Q. There have been further statements made, Dr. Reichel, that Dupont has it all over Sylvania in terms of production efficiency. Are you in accord with that opinion?

A. I don't think it is true now and I don't think it was ever true, if you put it that strongly.

Q. Those are not my words. It has further been stated that as of the time this suit was instituted, and that was 1947, Dupont was getting 25 per cent. more production per machine than Sylvania. Relative to that, Dr. Reichel, I show you Government Exhibit 553, which is a diagramatic presentation of the relative capacity, production, and number of machines operated by both companies. As explained at the time this was admitted, this is in terms of 100 per cent., showing Dupont's participation from the point of view of potential capacity, actual production, and number of machines.

Observing the chart, Dr. Reichel, for the year 1947 does it show that Dupont produced approximately 76 per cent. of the total domestic production, thus leaving Sylvania with
9018 24 per cent.?

A. That's right, according to this chart.

Q. For the same year does the chart show that Dupont possessed approximately 73 per cent. of the casting machines in operation in the United States, thus leaving Sylvania 27 per cent.?

A. That's right.

Q. So that with 73 per cent. of the machines, Dupont produced 76 per cent. of the cellophane manufactured in the United Sta during 1947?

A. Yes.

Q. Would you say that that was indicative of 25 per cent. greater output per machine?

A. Well, not 73 against 77 necessarily.

Q. At all? You said necessarily.

Mr. GESELL. I don't understand that question, your Honor. I move to strike it. He is arguing with the witness.

The COURT. Let's start afresh.

Mr. MINICUS. I will re-ask my question, your Honor.

By Mr. MINICUS:

Q. Can you find any evidence in that chart that the operational efficiency of the Dupont Company in 1947 was 25 per cent. more effective per machine?

A. Not in this chart. You have to know how many 9012 machines they were operating and how many machines Sylvania was operating.

Q. If I give you that information will you be able to answer my question?

A. I am not sure. There may be other factors, such as width of web and that sort of thing, that enters in.

Q. The width of the hopper is important, is it not, sir?

A. Yes, I suppose so.

Q. So that we just can't take the number of machines and figure out the operation on that basis?

A. No.

Q. How many casting machines does Sylvania possess at the present time?

A. 21.

Q. And for approximately what number of years has Sylvania been operating with 21 machines, sir?

A. Oh, I would say roughly ten years. Eight years anyway.

Q. In other words, in the past eight or ten years Sylvania has not increased the number of machines with which it has operated?

A. That's right.

Q. Approximately what is your present productive capacity, as of the present time?

A. Roughly 72 million.

9020 Q. Roughly 72 million? What, sir, was your capacity approximately in 1947?

A. 1947? Oh, I would say roughly 50 million.

Q. So that operating with the same number of machines Sylvania in the four-year period has increased its productive capacity approximately 22 million pounds?

A. Roughly, yes.

Q. And that is without any increase in the number of machines?

A. In the number of casting machines.

Q. Is it your considered opinion that a record of that nature is indicative of productive inefficiency?

A. That could be answered either way, because possibly it could have been much more than that during that period.

Q. Did you try to make it greater?

A. Yes. We are trying now, and expect to succeed.

Q. Are you satisfied with the efficiency of your productive department on that record?

A. No.

Q. Are you dissatisfied with it, sir?

A. No.

Q. Now does the chart that you have there, sir, show the relationship between production and potential capacity for the years which it graphically depicts?

A. May I have the question again?

9021 Q. Does the chart show the relationship between production and potential capacity?

A. It may at that particular time. It depends on how you define potential.

Q. The capacity, sir, is laid out——

A. That's right; and your have got the line, potential capacity, and your question refers to potential capacity. Well now, what is——

Q. Relating to production.

A. Relating to production at that time. Well now, the potential capacity even at that time we know now is much higher.

Q. Yes, but as of this time?

A. As of this time, I would say so.

Q. And the ratio between Dupont and Sylvania for potential capacity, according to that chart, remains fairly stable?

A. I don't know, you see. I don't know what Dupont's production is at the present time.

Q. Well, this shows it in percentages, sir.

A. This does up to 1947.

Q. Yes; and we are only questioning that period. That is the period of that complaint.

A. Oh, well, then, yes. Yes, I see. Yes.

Q. And does that ratio of production as between Dupont and Sylvania remain fairly stable as it is depicted on that
9022 chart?

A. Remain fairly stable as between what period now?

Q. The periods depicted on the chart.

A. Yes.

Q. Do you observe on the chart any wide variations between production and potential capacity as these two companies participated in those functions?

A. No.

Q. Dr. Reichel, an additional portion of the defendant's testimony is designed to establish that the development of new markets for cellophane was almost entirely the product of Dupont's efforts. They have stated that Dupont does the development work and then competition comes along and takes a nick in the big ones. Is that entirely in accord with your experience in the industry?

A. Well, I never thought of it that way. It was never my observation. I think they did more development work than we did. We had two people and Dupont of course had more. They did a lot of advertising in the Saturday Evening Post and various magazines like that. They spent a lot of money. And we received the benefit of that to some extent. But outside of that, I have no thoughts.

Q. Are you able to cite us some examples of outstanding market development which Sylvania has accomplished in the industry?

9023 A. Well, we developed a special amber wrapper to produce the effect of retarding rancidity, around fruit products of various kinds, for one. I suppose there have been others.

Q. Now with regard to Saran-coated cellophane, Mr. J. A. Mitchell, a research chemist for Dupont, has testified as follows: "Saran-coated cellophane is one of our newest developments, and a lot of the work is still in the process development stage. It is a new field, a new type of cellophane." Is it not true, Dr. Reichel, that Sylvania was in commercial production and actually selling Saran-coated film in 1943?

A. Yes, I think that is true. We made it as a military product at the time, for the wrapping of mortar powder. I don't recall to what extent we sold it for other uses. The entire production at that time was used for that purpose.

Q. And you were working rather closely with the Dow Chemical Company on that matter; is that true, Doctor?

A. Well, on the Saran. They produced the Saran.

Q. And your company coated the cellophane with the Saran?

A. That's right.

Q. So then you were actually working on Saran coating cellophane as far back as 1943; is that correct, sir?

A. That is correct. That's right.

Q. Do you have any recollection, Dr. Reichel, of certain facts which occurred during 1942 concerning the development of poison gas capes manufactured from cellophane or the cellophane that went into the capes?

9024

A. Yes, I do.

Q. Was a large quantity of this cellophane purchased by the War Department during the period of hostilities?

A. A great deal, yes.

Q. Would you say that this usage of cellophane accounted for the largest proportion of cellophane devoted to the war effort? Now I mean directly in hostilities, Doctor.

A. I would think so. I would think that is probably true.

Q. Who first developed that film?

A. Well, I will have to answer that question this way. The Quartermaster Office, I think, first started to work with Dupont on this problem, and Dupont had created a film where they put two sheets of cellophane together, laminated them together, and between these two sheets of cellophane was a thin gauze, which of course added considerable strength, but it was expensive and something of a problem to make. We started to work on the same thing and developed a heavy gauge cellophane, using a special plasticizer, which rainproofed the cellophane, and that product was adopted by the War Department, and we turned over the method and what know-how there was connected with it to Dupont.

Q. Do you recall contemporaneous with that production that the officials of the War Department were extremely concerned and disappointed with Dupont's efforts in the manufacture of war capes material?

9025

A. Well, I don't think I would put it that strongly. They were pleased with what we had done.

Q. What was the result of the entire thing, sir, as far as your selling this cellophane?

A. The result was that they required Dupont to make it the same way we did and make the same film we did.

Q. Is that the only result that happened during the interim period, sir?

A. No; during that interim period, while Dupont was getting into production, and we were already in production, they required us to turn over most of our machines to the production of this

product, and they asked Dupont to supply our customers with commercial cellophane during that period.

Q. Why did they have Dupont supply your customers with commercial cellophane, sir?

A. They had to be supplied.

Q. And you could not supply them?

A. Not with all our machines on war material.

Q. What were the methods, the sales procedures, under which Dupont supplied the Sylvania Company with cellophane for its commercial business?

A. I don't just recall now how that was done. I don't
9026 remember whether they shipped cellophane to Fredericksburg or whether they shipped direct to our customers. I think they shipped it to Fredericksburg and we split it up. That is my recollection.

Q. So on this very important developmental work for the war effort, Sylvania was first in actually succeeding in turning out a film that was acceptable to the War Department?

A. I would say that it was acceptable to the War Department, because the film that we made was more economical to make, easier to make, faster to make, and you could get into production much sooner.

Q. And was it more satisfactory in the beginning in operation?

A. I couldn't answer that question, except that it was what the War Department wanted, and therefore you could follow that logically by saying it was more satisfactory.

Q. Turning now, Dr. Reichel, to a consideration of the methods by which the Sylvania Corporation determined its prices for cellophane, are you familiar with the testimony previously given at this trial by Mr. Herbert Hamburg, of the Sylvania Division?

A. I read it. I haven't read it recently, but I read it after he testified.

Q. But you are familiar with the general nature of his testimony?

9027 A. Yes.

Q. You will recall then that his testimony was to the effect that the Sylvania Corporation procured newly published copies of Dupont's price list with each price change, and they copied the prices of these lists exactly; the Sylvania list was then dated back to the effective date of the Dupont list and published. Is that a reasonably accurate statement of the procedures followed by the Sylvania Corporation?

A. I don't know about the exactly part, but we followed Dupont's prices.

Q. Do you know whether the procedure described by Mr. Hamburg was the one followed by the Sylvania Corporation?

A. I think what he said was substantially correct, if I understood you, that we, after Dupont published their price list, or at the time that they sent out their new prices, we were informed of the change; but, as I recall, not till then.

Q. That is correct; but after you were able to acquire a Dupont price list you did get the prices?

A. Yes, substantialy.

Q. Substantially?

A. That's right.

Q. What do you mean by substantially, sir?

A. Well, I mean there may have been some items that were not exactly the same.

Q. Do you recall any instances of that, sir?

9028 A. No. But I could not go further than to say that I think they were substantially followed to my own knowledge?

9029 Q. Are you able to state, Dr. Reichel, the approximate number of times that that practice was engaged in by the Sylvania Company from 1930 to 1946?

A. I would say at least a dozen times.

Q. Do you recall that you had more than a dozen price lists issued during that period?

A. No.

Q. Mr. Hamburg further testified that this copying occurred on the occasion of each price change. Therefore, inasmuch as it occurred approximately twelve times in that number of years, don't you consider it probable that the du Pont Company was aware of the methods of the Sylvania Corporation in this regard?

Mr. GESELL. Objection, your Honor. He can ask him whether he knows there were or weren't. He can't ask him to surmise about it.

Mr. MINICUS. It is a reasonable inference from the state of facts we have established.

The COURT. Ask him if he has knowledge.

The WITNESS. I have no knowledge.

By Mr. MINICUS:

Q. Dr. Reichel, why did the Sylvania Corporation so slavishly copy the du Pont price list over such a long period of years?

A. I don't know.

9030 Q. What was your position with the company at that time?

A. In charge of production.

Q. Pardon me?

A. In charge of the plant.

Q. Were you an officer of the corporation?

A. Yes; I was an officer of the company, vice-president in charge of production, research and development.

Q. Were you not the second officer in charge of the corporation, next to Dr. Wallach?

A. Dr. Wallach ran sales.

Q. You were also a director of the corporation at that time?

A. No, I was a director for '37 on, from '38 on.

Q. And you don't know why the du Pont price list was copied time after time over a period of 13 years, or 12?

A. That wasn't the question. Your question was why it was slavishly followed. We had to follow it in order to compete, and to have dropped below the du Pont prices would have obviously meant less profit to us. There was no reason to do that. What we did was the normal customary thing to do.

Q. Were you having any trouble with your profit situation at that time? You would have liked to have more profits?

A. Everybody would like to have more profits. At least, that has always been true.

9031 Q. In fact, Sylvania was very satisfied with their profit situation from 1930 to 1940, were they?

A. I would say except for a period in 1927 and 1938 we were. If you look over our earning record, it wasn't too bad.

Q. Did you ever try to exact a somewhat higher price than the du Pont Company to improve that profit situation?

A. We raised prices once around 1949, I think.

Q. Did you ever prior to 1947?

A. No.

Q. Did you not testify in direct examination, Dr. Reichel, that you were always in an oversold condition?

A. That's right.

Q. Then what was the competitive factor that prevented you from trying to get a little higher price for yourself?

A. We wouldn't have been in an oversold condition if we had charged a higher price.

Q. So it is your testimony, then, Dr. Reichel, that it was impossible for you to charge any other price but the du Pont price?

A. I didn't say that, but that's what we did.

Q. Did you not testify that your reason for copying these prices was because you had to charge the same price?

A. We thought it was good business to do that.

Q. Mr. Hamburg further testified that there are in the
9032 cellophane business certain non-standard items, such as No. 600 Red, or 450 Black, which do not appear, or did not appear, on the Sylvania Company's price list. Is it true that the

price of such non-standard items, for which orders are not plentiful, were not published?

A. I don't know. I couldn't answer that question.

Q. You never had any knowledge of non-standard items that weren't published on your price list?

A. You are asking me about black and red.

Q. I illustrated with that.

Mr. GESELL. Don't cut him off.

A. (Continuing.) Black or red in 1952, and I have been away from Sylvania since '46, except as one of our plants.

Q. During your tenure at Sylvania, Dr. Reichel, did you know that there were non-standard items that did not appear on the price list?

A. I would say that I did.

Q. I show you Government Exhibit No. 271, which is a memorandum from Mr. H. H. Replogle to yourself, dated August 16, 1938, on the subject of No. 400 colored and 300 colored, in rolls, and ask you to observe particularly the first paragraph.

Did Mr. Replogle therein inform you that there seemed to be no established prices for the subject items?

A. That's right.

Q. Did he also state there, "We have been officially advised by our competitor that they do not have established
9033 prices and quote only according to width, the roll type, color or quality."

A. That's right.

Q. Did Mr. Replogle, who sent you that letter, ever explain to you what he meant by stating that he had been officially advised by your competitor?

A. No.

Q. Did you wonder what he meant at the time?

A. I doubt it.

Q. Wasn't it unusual for Sylvania to be advised by their competitor as to information pertaining to prices?

A. I would say so.

Q. And yet you didn't think that was strange in that letter?

A. We never discussed prices with our competitor.

Q. You never discussed prices with your competitor, is that your statement?

A. Yes.

Q. You didn't?

A. I said we.

Q. Whom does that include?

A. It included everybody.

Q. In the corporation?

A. Yes.

Q. Are you aware that Mr. Replogle testified on cross-
9034 examination in this trial, at page 1922 of the transcript, that he explained this statement with the remark that he probably called up John Hatt of the du Pont Company and asked him if they had prices for those sizes? Have you read Mr. Replogle's testimony?

Mr. GESELL. Wait a minute; you've got a question pending. Don't pile them up three or four at a time.

The COURT. Let's have the last two questions read.

(The reporter read the questions.)

The WITNESS. I did sometime ago.

By Mr. MINICUS:

Q. And you are aware, then, that he testified to that effect?

A. I have no reason to question it.

Q. What was Mr. Replogle's position with the Sylvania Corporation?

A. Vice-president in charge of sales.

Q. Are you aware that Mr. Replogle further testified on redirect examination in this regard that he probably called Mr. Hatt because he was the only one he would ever ask any questions of and he had no hesitancy in asking him any information; likewise, if Mr. Hatt asked him for any he got it?

A. Yes, I read that.

Q. Do you know that when Mr. Replogle was asked if
9035 he had called Mr. Hatt on more than one occasion he responded, "If I wanted information." Did you read that?

A. Yes.

Q. Now, this is the same Mr. Hatt that you testified on direct examination gave Sylvania the information with regard to its participation in the sales of moistureproof cellophane, is it not?

A. That's right.

Q. How did you receive that information from Mr. Hatt?

A. I didn't receive it. Dr. Wallach received it, and I received it from Dr. Wallach.

Q. In what form did Dr. Wallach receive it?

A. I don't know.

The COURT. Recess until two o'clock.

(At this point a recess was taken until 2:00 p. m. the same day.)

2:00 O'CLOCK, P. M., THE SAME DAY.

Present: As before noted.

FRANK H. REICHEL (Resumed).

Cross-examination (cont.) by Mr. MINICUS:

Q. There was some discussion this morning, Dr. Reichel,
9036 concerning the earnings of the Sylvania Corporation and why they were so low. Do you agree that the pricing policies of a business organization will normally reflect themselves in the company's earnings, and more particularly in the rate of return?

A. There is a relationship, yes.

Q. Do you further agree that as between two manufacturers of the same product the one who consistently achieves a higher margin of profit possesses an inherent competitive advantage over the lower?

A. I would agree with that.

Q. You do agree with it, sir?

A. Yes.

Q. Are you familiar in a broad sense with the earnings and the record of earnings of the Sylvania Corporation from its cellophane operations during the period 1936 through 1949?

A. Not too accurately. I have an idea.

Q. I say in a broad sense.

A. Yes, in a broad sense.

Q. Are you able to designate the approximate average rate of earnings before taxes in relation to the investment of Sylvania's cellophane operations for any period of years you may select? In other words, sir, with relation to investment, for any period of years that you may be familiar with, what was the rate of Sylvania's earnings?

9037 A. Well, they averaged about—take the period from 1936 through 1939,—they averaged about two dollars and a half a share on four hundred odd thousand shares, which would be about a million dollars net after taxes. On sales during that period, possibly fifteen million,—thirteen to fifteen million,—which is about 7 or 8 per cent. net after taxes.

Q. After taxes?

A. Yes. Normally you figure 10 per cent. as a satisfactory earning, I would say, after taxes.

Q. During the period from 1935 through 1940, was the annual rate of return before taxes on investment generally higher or lower than a range of between 25 and 35 per cent.? That is, before taxes?

A. That question again, please?

Q. Your rate of return before taxes for the years 1935 through 1940,—could you say whether it was generally higher or lower than a range of between 25 and 35 per cent.?

A. It was lower than between 25 and 35 percent.

Q. During the same period, was the rate of return on Sylvania's cellophane operations after taxes and all other expenses greater or less than a range of from 19 per cent. to 27 percent.? That is, after taxes?

A. Less.

Q. Considerably less, sir?

A. Yes, considerably less.

9038 Q. During earlier testimony in this trial it was established that Sylvania equalizes freight charges on the basis of the cost from the buyer's place of business to the nearest Dupont plant. Are you familiar with that procedure?

A. Only in a very general way.

Q. I show you Government Exhibit No. 552, which is a map of the United States, upon which has been geographically portrayed the locations of the Dupont plants at Buffalo, New York, Clinton, Iowa, Old Hickory, Tennessee, and Richmond, Virgina, and these have been set down in relation geographically to the Sylvania plant at Fredericksburg. Now if you are able, I ask you to take this map and explain to the Court how freight equalization would work.

A. Well, in a general way,—and that is as far as I can go,—I would say that if we had a customer at, say, Washington, D. C.,—or take a customer at Richmond, say, where Dupont had a plant,—we would lay cellophane down at Richmond at the same price as Dupont would lay cellophane down at Richmond.

Q. And who would bear the cost of the freight from Fredericksburg to Richmond?

A. Sylvania, I would say.

Q. Although cellophane is normally sold by Sylvania f. o. b.?

A. That is right.

9039 Q. So that at Richmond Dupont would have a freight advantage?

A. That's right.

Q. If you had a customer in Chicago and you were shipping from Fredericksburg to Chicago, in light of the Dupont plant at Clinton, Iowa, how would your freight equalization work in that case?

A. There would be an adjustment of the freight so that the cellophane laid down in Chicago would be the same price to the customer as though he had bought it from Dupont at Clinton, Iowa.

Q. And the difference of the freight between Fredericksburg and Clinton would be borne by the Sylvania Corporation?

A. Yes.

Q. And likewise if you were selling a customer in New Orleans, in view of the Old Hickory plant, you would pay the difference in freight from Fredericksburg to Old Hickory?

A. I think so.

Q. Observing the map for a moment again, Dr. Reichel, is there any significant area there, an area of substantial size, in which Sylvania would have a freight advantage over Dupont?

A. I would not see any.

Q. So that in practical operation this freight equalization almost invariably worked to the disadvantage of the
9040 Sylvania Corporation.

A. I suppose so.

Q. And freight equalization then was a cost item that increased Sylvania's costs and hence lessened their profits?

A. That's right. I agree with that.

Q. Will you kindly explain to the Court, Dr. Reichel, the manner in which Sylvania indemnified its customers against loss under the quantity discount schedules which were in existence until 1947, when the customer split his purchases between Dupont and Sylvania?

A. When a customer was entitled to a maximum discount, which I believe was 10 per cent.,—I believe that was the maximum, as I recall,—I am not quite sure of the figure,—we would give that customer the same discount for the quantity that he purchased from us.

Mr. MINICUS. With your Honor's indulgence, I would like to work this out on the blackboard with the witness.

The COURT. Please do.

By Mr. MINICUS:

Q. Now let us assume that a company such as R. J. Reynolds might purchase $1,500,000 worth of cellophane in a single year. Now——

Mr. GESELL. From whom?

Mr. MINICUS. We are just assuming they are purchasing it. We will get to whom in a moment.

9041 Mr. GESELL. Thank you.

By Mr. MINICUS:

Q. Now Reynolds has $1,500,000 worth of cellophane to buy. If they bought that entire amount from the Dupont Company, do you know the discount they would get on that amount?

Mr. GESELL. I object to that, your Honor, unless he names the time.

Mr. MINICUS. Yes, sir, I will name the time.

By Mr. MINICUS:

Q. Dr. Reichel, I am speaking about a period of time prior to 1947, and I show you Government Exhibit 5033, which shows the prevailing discount schedule in 1946. Under the column present is the prevailing discount.

A. And your question was what would the discount be?

Q. What would the discount be on——

A. Based on this scale, it would be 10 per cent.

Q. That would be equivalent to a rebate from the Dupont Company of $150,000; is that correct, sir?

A. That's right.

Q. Now let us assume that R. J. Reynolds splits its purchases so that they buy $1,000,000 worth of cellophane from Dupont in a year. According to the schedule, sir, what bracket would that put it in?

A. 7½ per cent.

Q. That would be $75,000; is that correct, sir?

9042 A. That's right.

Q. So our rebate from Dupont on the purchase of a million dollars is $75,000?

A. Yes.

Q. Now let us say they give the other $500,000 business to Sylvania. What would Sylvania pay on the $500,000 worth of business? Just that $500,000 that they bought alone?

A. They may have paid in some cases 12½ per cent.

Q. Well, on that $500,000, this share here, is it not true that on that they would pay at least 10 per cent.?

A. That's right.

Q. So that would be 10 per cent. of the $500,000, which would be $50,000?

A. That's right.

Q. Now Reynolds, by virtue of shifting or splitting its business, only gets 7½ per cent. from Dupont. Where do they pick up the 2½ per cent. that they would have lost if they had given all of their business to Dupont?

A. Well, they may have been willing to forego the 2½ per cent. in order to have two sources of supply, but I am not sure.

Q. Didn't you indemnify them against that loss, sir?

A. Some customers we did, but not all.

Q. So in that situation, if the indemnification was working, you would have given them that extra 2½ per cent.?

9043 A. That's right. I say I am not sure whether we did or not, but it is possible that we did. I would not deny doing it.

Q. And that would have been 2½ per cent., would it not, sir, on the entire volume of the business?

A. As you stated.

Q. Yes, sir. Which would be an additional $25,000?

A. Yes.

Q. So is it not true that where this indemnification policy worked, for $500,000 worth of business Sylvania had to rebate $75,000, and Dupont only had to rebate $75,000 for twice that business, or a million dollars worth of business? Is that true, sir, where the indemnification policy was working?

A. I mean if you put it that way, sir. Where it worked. Of course, it didn't work this way everywhere, and it was always voluntary with us whether we woud permit it to work or whether we wanted the business, see, on that basis.

Q. Did you practice indemnification with those cigarette companies from which you got business?

A. I would answer that question by saying we practiced some indemnification.

9044 Q. Why was it necessary for Sylvania to pursue this policy of indemnification?

A. Well, it was necessary to get that particular business.

Q. You thought you had to do it to get that business?

The COURT. Mr. Minicus, will you go back to that $25,000 item again? You went too fast; I didn't get it.

Mr. MINICUS. It is simply this: Reynolds knew if they bought entirely from du Pont they were going to get $150,000 rebate a year.

The COURT. I realize that. Just that last item of $25,000. What does that figure represent?

Mr. MINICUS. That is the 2 and ½ per cent of the entire amount which was the indemnification.

Mr. GESELL. It just can't be, your Honor, because it doesn't figure out that way. He has got it mixed up, because 2 and ½ per cent of one million, five, is not $25,000 and it could not possibly be.

The COURT. That was what was bothering me.

Mr. MINICUS. I see what it is. It was to make up the difference that they will lose.

The COURT. It was on one million, not one million and a half. I have it.

By Mr. MINICUS:

Q. Now, was the effect of this discount indemnification policy that Sylvania was forced to accept as a burden a
9045 second additional cost item which did not accrue to du Pont?

Mr. GESELL. I object, your Honor. There is no testimony. The witness didn't say he was forced to accept it as a burden. That is Mr. Minicus's testimony, not the witness's.

The COURT. My recollection is, assuming it to be accurate, that the witness said that it was purely voluntary; he could enter into that arrangement or he wouldn't get the business. That was his testimony.

Mr. GESELL. That is right. Nothing about being forced to accept a burden.

By Mr. MINICUS:

Q. Am I wrong in assuming, sir, that the Sylvania Corporation didn't necessarily enjoy paying these extra amounts to get the business?

A. I think you can say we didn't enjoy it. That is all right. I agree with that.

Q. Was the effect of this discount indemnification a second additional cost item which did not accrue to du Pont?

A. I think the answer to that is yes.

Q. Doctor Reichel, are you able to state approximately the total amount of royalty payments made by Sylvania to du Pont under the licensing agreement for moistureproof cellophane of April 26, 1933, throughout the life of that agreement?

A. I hesitate giving a figure, but I think it is about
9046 two million dollars.

Q. About two million dollars? Thank you, sir.

I show you, sir, Government's Exhibit 449 and ask you to state the amount of royalty paid by Sylvania under the moistureproof agreement for the year 1944 alone?

A. This shows $212,627.

Q. Now, if I may ask, sir, with the effects of these large royalty payments which you made each year, did that cause an occurrence of an additional cost to Sylvania which in turn constituted revenue to du Pont, thereby increasing the spread between the relative earnings of the two corporations?

A. By that amount.

Q. Yes, sir. It was a cost item to you and a revenue item to du Pont?

A. Yes.

Q. Did the Sylvania Corporation purchase pulp from Rayonier?

A. Yes, it does.

Q. Was Rayonier a principal supplier of pulp to Sylvania?

A. It was.

Q. From time to time has Sylvania cooperated through conferences and discussions with Rayonier in a joint effort to improve the quality of pulp intended for use in the manufacture of cellophane?

A. As is normally done in this industry, yes.

9047 Q. Did Sylvania corporation ever receive regular rebates on its purchases of pulp from Rayonier?

A. I am not quite sure, but I think that there was a special price on cellophane pulp, which is around five dollars a ton less than for the rayon grade.

Q. But that was a special price? That was not a rebate, was it?

A. No, a special price.

Q. Assuming, Dr. Reichel, that the du Pont Company also purchased large quantities of pulp from Rayonier for which du Pont regularly received a rebate which was not forthcoming to Sylvania, would this increase Sylvania's cost relative to du Pont's?

A. Relative to du Pont's it would.

Mr. MINICUS. We will connect that up at a subsequent point, your Honor.

Q. With regard to the moistureproof agreement of April 26, 1933, were the patent rights which passed thereunder at that time, at the time of execution, limited to patents then in existence?

A. They were. As I recall, they were.

Q. Before I go into the agreement, sir, do you recall also that there was an engagement to pass rights under patents not yet in existence?

A. I don't recall that.

9048 Q. To refresh your recollection, I will read paragraphs 2 and 3 from Government Exhibit 2487, which is the moistureproof agreement of April 26, 1933:

"du Pont further agrees to grant to Sylvania at the latter's election a license or licenses under any future patent or patents granted to or acquired by du Pont prior to October 6, 1948."

There is a similar clause in number 3. Does that refresh your recollection, Dr. Reichel?

A. It does, yes.

Q. Did the terms of the agreement require Sylvania to give du Pont a first refusal of rights to a license under any patent within the subject matter of the agreement which Sylvania might in the future develop?

A. Not to my knowledge.

Q. "Sylvania likewise agrees to grant to du Pont at the latter's election a license or licenses under any future patent or patents granted to or acquired by Sylvania prior to October 6, 1948."

Does that now say, sir, that Sylvania will give du Pont the right to acquire an exclusive license under future patents? It does?

A. It does.

Q. In its original form did the terms of the agreement dated April 26, 1933, require mutual consent by both parties thereto as a prerequisite to the granting of additional licenses under the moistureproof agreement?

9049

A. I think it probably did.

Q. Do you recall that the form of this condition was subsequently altered?

A. No.

By the COURT:

Q. What happened, Doctor, after the license expired in 1948?

A. It was changed. Originally we had what is called an exclusive license and it was changed around 1945 to a non-exclusive license. That was the change which occurred. I don't know whether that is the change which Mr. Minicus has in mind. I don't know.

Q. What is the present license, Doctor?

A. It has expired.

Q. It has expired?

A. Yes.

By Mr. MINICUS:

Q. Did Sylvania offer a license to du Pont each time a patent on moistureproof cellophane issued to it subsequent to the date of the agreement?

A. I don't recall that we did. That is why I answered that question originally the way I did, because I don't recall that we did. That was handled by the patent department, and the patent department reported to Dr. Wallach; but if that was in the agreement, I am sure we lived up to the agreement.

9050

Q. You lived up to the agreement in every respect then, Doctor?

A. Yes.

Q. You have testified, Dr. Reichel, that you lived up to this agreement in every respect, and you further testified this morning that the Sylvania corporation never considered its right to manufacture and cell moistureproof cellophane restricted as to quantity by virtue of the moistureproof agreement of April 26, 1933. Was the reason for this that the Sylvania corporation officially considered the agreement in its entirety violative of the anti-trust laws and unenforceable under the Sherman Act?

A. No.

Q. Dr. Reichel, within the past three years has the Sylvania Division through its representatives acting in their official capacities

made representations to officials of the United States Government that the moistureproof agreement of April 26, 1933 violated the anti-trust laws and more particularly the Sherman Act?

A. Not to my knowledge.

Q. What is your capacity, sir, with the American Viscose Company?

A. I am president of the American Viscose Company.

9051 Q. And the Sylvania Division is a division of the American Viscose Company?

A. That is right.

Q. Do you recall, sir, a claim that you had before the Treasury Department for a refund of excess profits payments?

A. We had one.

Q. Do you remember the facts and the circumstances of the prosecution of that claim?

A. No. They were handled by outside counsel, tax counsel.

Q. Did you present any testimony, written or oral, in connection with that claim?

A. Non oral, and I don't recall anything written.

Q. Did any of the officers of the Sylvania Division of the American Viscose Company present any testimony in connection with that claim?

A. It could be, but I don't know.

Q. Did any official of the old Sylvania corporation present any testimony in connection with that claim?

A. I don't know that either.

Q. Are you acquainted with Mr. George Hills, an attorney practicing in New York City?

A. Yes, very well.

Q. Did Mr. Hills present his testimony in the form of an affidavit in connection with that claim?

9052 A. It could be; I don't know.

Q. You never saw it?

A. No.

Mr. MINICUS. Your Honor, this is a very vital issue. The witness's answers on cross-examination have taken us completely by surprise. I think the reason for the surprise is obvious. There was an important claim before the Treasury Department. It is the plaintiff's position that one of the basic elements of this claim was the illegality of this agreement. We never dreamed that the witness would deny any knowledge of it. Therefore it will be necessary for us to have the papers released from the Treasury Department to bring into this court to refresh the witness' recollection.

The COURT. I don't know whether you can do that or not.

Mr. MINICUS. The release of the papers?

The COURT. Yes.

Mr. MINICUS. These papers I am quite certain we can, your Honor.

The COURT. I mean, I don't know what Sylvania's position would be on that.

Mr. MINICUS. In connection with what?

The COURT. Producing tax papers.

Mr. MINICUS. These were not submitted for the benefit of the United States Government, sir, but in a claim
9053 against the United States Government.

The COURT. I understand. Isn't there some question as to whether you can produce the files of the Tax Office? The Commissioner in cases heretofore before me has taken the position that he would not.

Mr. MINICUS. We would like to have the opportunity to discuss this matter with the Commissioner.

The COURT. Surely.

Mr. MINICUS. Therefore, I ask that the witness be dismissed subject to recall on further cross-examination.

Mr. GESELL. I violently object to that. Let us finish the rest of the examination, your Honor.

The COURT. Oh, yes.

Mr. GESELL. Let us not engage in that.

Mr. MINICUS. This is the concluding point of my examination, your Honor.

The COURT. Well, if you have nothing further—where do you live, Doctor?

The WITNESS. Philadelphia.

The COURT. Then that will be all right.

Mr. GESELL. Then you have no questions other than the questions as to what representation his counsel made to the Treasury Department; is that my understanding?

Mr. MINICUS. My understanding, if your Honor please, is
9054 that I will have the right, once I have refreshed the witness' recollection——

The COURT. On that subject matter.

Mr. MINICUS. On that subject matter.

The COURT. But we are through with any other subjects of inquiry with this witness?

Mr. MINICUS. Yes, sir.

The COURT. That is fine.

Mr. GESELL. I have some redirect examination, your Honor.

Redirect examination by Mr. GESELL:

Q. Dr. Reichel, you were asked about quality, and you said that you thought the quality of Sylvania's cellophane was the same quality as Dupont's cellophane at the present time?

A. That's right.

Q. Do you think it always has been?

A. Well, we always felt that Dupont's quality was a little better on the average, over a period of years. Up until the merger, certainly.

Q. You also were asked as to whether the earnings of Sylvania were satisfactory, and you said you thought they were except in the years 1937 and 1938. Were you talking about the company as a whole or the earnings of cellophane alone?

9055 A. I was talking about the company as a whole. The earnings on cellophane alone would have been somewhat higher.

Q. And the figures you gave for the years 1936 and 1939, in answer to Mr. Minicus, after lunch, were also talking about the company as a whole; is that right?

A. That's right.

Q. Did you have any agreement or understanding, Dr. Reichel, of any kind, with Dupont, as to how you would handle freight equalization?

A. No.

Q. Did you have any understanding with them of any kind as to how you would meet quantity discount schedules?

A. No.

Q. If that example on the blackboard were to be changed and Reynolds was buying a larger quantity, the only thing you had to do, if the quantity when split in two equalled the maximum quantity discount level, was to pay the same discount as Dupont, was it not?

A. That's right. And that happened in a number of cases. I don't know that we were ever hit to this extent, actually.

Q. To the extent shown on the board?

A. Yes.

Q. Was there an occasion that you mentioned in 1949—I think there was on cross—where your prices were higher than

9056 Dupont's prices?

A. Yes, there was a period of around six or seven months when I believe our prices were about four cents higher.

Q. Why did you reduce them to Dupont's prices?

A. At that time?

Q. Yes.

A. I think at that time that was a period when costs of everything were going up, it was after the war, it was in 1949, and I

think, as I recall, Dupont came up to ours, or just below ours, or just over ours—I don't remember which.

Q. Did you lose or gain business when this price differential existed?

A. We lost business.

Q. Dr. Reichel, has Sylvania ever attained a casting speed of 132 yards?

A. No.

Q. Has Sylvania ever attained a speed on coating of 220 yards per minute?

A. Yes.

Q. Has Sylvania ever attained a solvent recovery ratio as high as 97 per cent.?

A. Not quite.

Q. Has Sylvania's power requirements even been as low as one-half horsepower per meter of speed of casting machine?

A. I wouldn't know. I couldn't answer that question.

9057 Q. Has Sylvania ever attained a splitting speed of a thousand feet per minute?

A. Not quite.

Q. Has Sylvania ever narrowed the trim on its waste to a half-inch per side out of the casting machine?

A. No.

Q. Has Sylvania ever achieved as low a finishing waste as 3½ per cent.?

A. No.

Q. Has Sylvania operated only with one employee per casting machine?

A. No.

Q. Do you consider the amount of pounds per casting machine produced a measure of efficiency of production regardless of the width of the hopper?

A. May I have that question again, please?

(The last question was read by the Reporter.)

The WITNESS. Yes, I think you could consider that an indication.

Q. You were asked, Dr. Reichel, whether the royalty that you had to pay under the moistureproof license did not constitute an additional cost item, and you said it did. Did you obtain any benefits in cost as the result of the item, and, if so, how did they compare with the cost of the royalty?

A. As I said this morning, the process we were using

9058 was more expensive than the Dupont process prior to the time of settling the suit. Now just what that proportion was or what that ratio was, I don't recall.

Q. So you are not able to tell us whether the payment of the royalty represented a cost saving or a cost expense when the efficiency of your process is taken into account; is that right?

A. That's right.

Q. In your work with Rayonier, to which you were referred on your examination, did you assist Rayonier in pilot plant operations and tests of that kind?

A. No.

Mr. GESELL. That is all.

Re-cross-examination by Mr. MINICUS:

Q. Now, Mr. Gesell asked you a series of questions about your product relative to the Dupont product. The only conclusion I can gather from your responses,—and my question will be to ask you to correct me if I am wrong,—is that the product of the American Viscose Company is inferior to that of the Dupont Company.

A. I didn't say that.

Q. Well, what were the answers to all of these questions when you said yes, yes, yes, relative to efficiencies and qualities, designed to show?

9059 A. They did not have to do with the quality. They had to do with speeds and efficiency.

Q. Then the efficiency of the American Viscose Company is inferior to that of the Dupont Company?

A. Oh, I wouldn't say that. I would say our cellophane costs are somewhat higher. Production costs.

Q. And the only place that anyone can get efficienctly made cellophane in the United States prior to 1947 would have been the Dupont Company; is that correct, sir?

The COURT. That is not what the witness has said.

The WITNESS. No, this is not right.

The COURT. He is talking of the production line and features of production. The features of the product have nothing to do with it, and I don't think it is fair to ask Dr. Reichel to knock down his own product.

Mr. MINICUS. I thought that is what Dr. Reichel was doing himself.

The COURT. No, that is not the way I interpret the testimony.

The WITNESS. The quality was not in it at all.

The COURT. The quality was not in issue at all.

By Mr. MINICUS:

Q. Then your quality is equal to that of the Dupont Company?

A. That's right; today it is.

9060 Q. And it was not in previous years, sir?

A. I said previously that for a number of years prior to the merger with Viscose we felt that on the average the Dupont quality had a little edge on ours.

Q. Up till what time was that?

A. Well, the merger was 1946.

Q. So then prior to 1946 Dupont was the only available source of first-class cellophane in the United States?

A. No. No, that is not the point.

Q. If their quality was better than yours, it would seem that yours must have been second class?

A. That was not what I said. There were about 58 different kinds of cellophane made, and when you take that into consideration, at times some of our qualities would be better than theirs, at times some of their qualities would be better than ours. And what I said was that on the average over that period we honestly felt—I mean not our Sales Department, but the scientists in the organization—honestly felt that the Dupont had a little edge on us when it came to quality.

Mr. MINICUS. Thank you.

The COURT. You are excused, Doctor.

RUSSELL M. PICKENS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

9061 Mr. MCGLOTHLIN. Your Honor, Dr. Pickens is an officer of a company now known as Raynier, Inc. Prior to 1930 he was a Dupont employee, succeeding Dr. Benger as Chemical Director of the Technical Division of the rayon and cellophane companies. His testimony will be addressed to charges made in Paragraphs 32 and 36B of the Complaint, which are elaborated in the Government's brief, Paragraphs 170 and 171. He will testify as to the circumstances of his going to Rayonier, the characteristics of the relationship between Dupont and Rayonier.

Direct examination by Mr. MCGLOTHLIN:

Q. Would you give us your full name, Dr. Pickens?

A. Russell M. Pickens.

Q. What is your present position?

A. I am Vice President in charge of sales at Rayonier, Incorporated.

Q. Where were you educated, Doctor?

A. I got my undergraduate training at Montana State College; my graduate training, where I received a Master's Degree, an MS Degree, and a Ph. D. Degree in chemistry, at Iowa State College.

Q. Are you a member of any chemical societies?

A. Yes; I am a member of the American Chemical Society, the American Institute of Chemists, the American Institute
9062 of Chemical Engineers, the Technical Association of the Pulp and Paper Industry, and the American Association for the Advancement of Science.

Q. When did you first come to Dupont as an employee?

A. In April 1925.

Q. Was that your first employment after receiving your doctorate?

A. Yes, I went immediately from graduate work to Dupont.

Q. What was your initial work with Dupont?

A. I started as a research chemist in the Chemical Division.

Q. The Chemical Division of what, sir?

A. The Chemical Division of the Dupont Rayon and Cellophane companies.

Q. Did those companies have a joint Chemical Division?

A. That was a joint Chemical Division. My first problems were on rayon manufacture, problems connected with it.

Q. Who was then the head of the division in which you were employed?

A. Dr. Benger was the Chemical Director at that time and employed me.

Q. How many people were in this research branch of the rayon and cellophane companies when you came to it?

A. I would say in the order of twenty people at that time.

9063 Q. How long did you stay with the Technical Department of the rayon and cellophane companies?

A. Until June 1930.

Q. Had you risen in the department during that five years?

A. Yes, I had a number of different positions in steps until finally I succeeded Dr. Benger as Chemical Director.

Q. What were your duties as Chemical Director and to what extent did they require you to have familiarity with rayon and cellophane manufacture by Dupont?

A. To do the job properly, you had to have complete familiarity with both rayon and cellophane manufacture.

Q. Did you go into the cellophane plant at Buffalo yourself?

A. Yes. As a matter of fact, my office was in the cellophane plant when I first joined the company.

Q. Did your duties ever carry you into the casting room?

A. Yes, many times.

Q. The chemical building as well?

A. Yes.

Q. To what extent did your duties require you to be familiar with the research that was going on in cellophane?

A. I was responsible in a general way for all the research that went on in connection with cellophane manufacture.

9064 Q. At that time, from whom was Dupont buying wood pulp for use in its rayon and cellophane manufacture?

A. They were buying from, I believe it was called at that time, the Eastern Manufacturing Corporation and the Riorden Pulp Sales Corporation, which is the selling agency for International Paper Company.

Q. From what part of the country was the timber cut that that pulp came from?

A. That was all in either northeastern United States or Canada.

Q. Eastern Canada?

A. Eastern Canada, yes.

Q. During your time with Dupont in the Chemical Department, was the representative of any pulp manufacturer ever allowed in the cellophane casting rooms?

A. No, not to my knowledge.

Q. What pulp manufacturer, if any, was given access to the research on rayon and cellophane?

A. None was given access to research. At times laboratory samples might be evaluated and a general opinion of the quality given, but no one had access to the research reports.

Q. To what extent were representatives of any pulp manufacturer allowed freedom of the research laboratories?

A. I don't believe any pulp manufacturer had freedom to go through the research laboratories.

9065 Q. Dr. Pickens, I want to show you an exhibit, Defendant's Exhibit 624, on which you are an addressee in a postscript. Would you look at that exhibit, please?

A. I recognize Dr. Benger's initial and the letter.

Q. Would you tell us to what extent the statements in that exhibit represent the policy while you were with Dupont as to technical cooperation with pulp manufacturers?

A. Yes, I think they do clearly state what the policy was at that time.

Q. Did you go to France as a representative of Dupont while you were an employee of Dupont, Dr. Pickens?

A. Yes, I did, in the Fall of 1929.

Q. What was the purpose of your visit?

A. We visited the rayon and cellophane plants of our French associates, these plants being located in France, Belgium, Germany, and Switzerland.

Q. Will you tell us what secrecy restrictions you found at the French cellophane plant when you attempted to get into it?

A. I found them very particular about my identity and my

length of service with Dupont and whether I was a solid or reliable Dupont employee.

Q. What was your first contact with the company then known as Rainier Pulp & Paper Company?

A. My first contact or my first interest in it was a
9066 little indirect, in that one of the men in the Chemical Division was sent out to Rainier to give some preliminary advice and to determine whether or not rayon or cellophane pulp could be made from northwest woods.

Q. Hadn't such pulps been made from northwest woods up to that time?

A. No, they had not.

Q. When did anyone directly approach you with respect to Rainier?

A. I was invited to meet with Mr. Mills, the President of the Rainier Pulp & Paper Company, in San Francisco, about February or March of 1930.

Q. Did you go out?

A. Yes, I did. I went out for the purpose of an interview with a view to employment by Rainier. I made a trip to the three northwest mills, of which Mr. Mills was President of all three, returned to San Francisco to talk with Mr. Mills about the matter.

Q. What was Mr. Mills' proposal to you?

A. Mr. Mills asked whether I thought Dupont might loan me or give me a leave of absence for a period of time, during which time it could be determined whether or not rayon or cellophane pulps could be made from these northwest woods.

Q. It has been stated by the Government in this case, Dr.
Pickens, that Rainier was a ranking supplier of wood
9067 pulp specializing in types particularly suitable to the manufacture of cellophane in caps and bands. When did the Rainier Pulp & Paper Company start making pulp of any sort?

A. The first manufacture, I believe, was May 1927.

Q. What type of pulp was that?

A. That was, I believe, a sulphite paper pulp.

Q. Was it suitable for rayon or cellophane?

A. No, it was not.

9068 Q. How many mills, paper pulp mills, were included in Rainier Pulp and Paper Company in 1930?

A. There is just the one company which was Rainier Pulp and Paper Company. There are two associate companies of which Mr. Mills was president: the Grays Harbor Pulp and Paper Company at Hoquiam, Washington, and the Olympic Forest Products Company at Port Angus, Washington.

Q. Were any of these companies making pulp suitable for rayon or cellophane?

A. No.

Q. You told us that Mr. Mills approached you with the idea asking whether du Pont would be willing to release you during your trip out there?

A. Yes.

Q. Did he suggest any technical cooperation beyond your own personal employment?

A. Yes, he did. I told him that I would doubt if du Pont would consider giving me a leave of absence to work for them. He then asked whether I thought some arrangement could be made or worked out whereby du Pont could give technical assistance and advice in return for some fee.

Q. What happened after you had finished your trip out there and gotten the proposition from Mr. Mills?

A. I told Mr. Mills that I would consult with Mr. Yerkes,
9069 who was president of those two companies, and let Mr. Mills know his reaction.

Q. Will you go on and tell us what happened next? You came east, I suppose, next?

A. Yes, I came east. I was stationed in Buffalo at that time. Mr. Yerkes was in New York and I saw him in New York and presented this matter to him, and he expressed a definite interest in it.

Q. What part if any did you have in the negotiation of the terms of the contract that resulted between Rainier Pulp and Paper Company and du Pont?

A. I had no active part in that matter. I did talk with Mr. Farmer who was head of the Development Division of the Rayon and Cellophane Companies at that time. I then talked with Mr. Mills by telephone, and on his instructions then explained the problem to Mr. John C. Higgins of Sullivan and Cromwell who was located in New York and who was an officer of Rainier Pulp and Paper Company.

Q. Then you dropped out of the negotiations?

A. Yes, I dropped out of the negotiations at that point.

Q. Did you yourself make a contract with Rainier Pulp and Paper Company for your own employment at that time?

A. Yes, I did.

Q. Did you have any arrangements with du Pont continuing in any way your relationship with them while you were out at Rainier's plant?

A. That wasn't in the form of a contract with me per-
9070 sonally. It was included in the terms of the contract between du Pont and Rainier Pulp and Paper Company.

Q. What was that arrangement?

A. I was given a leave of absence for a period of two years without loss of seniority or any rights which go with employment in du Pont.

Q. Were those provisions important to you from a personal standpoint?

A. Yes, they were.

Q. Why so?

A. There was considerable doubt in those days whether a good pulp for rayon and cellophane could be made from northwest woods, western hemlock particularly. There was even quite a little doubt whether a good paper pulp could be made from those woods. It was not known whether we could work out a successful solution to a rayon and cellophane pulp or not, and Mr. Mills didn't feel that he wanted to take me away from the company where I was already employed where after a two-year period it might be a failure and he would have no other work to offer me.

Q. You then leave du Pont where you were chemical director of the technical division of cellophane and rayon?

A. Yes.

Q. And go to Rainier?

A. Yes.

9071 Q. When was that?

A. I believe I left du Pont June 8, 1930, and arrived at Shelton, Washington, about two weeks later. I drove out.

Q. At that time how much did you know about the chemical requirements for pulp for use in du Pont's rayon or cellophane plants?

A. Well, we had a very liberal, practical education and particularly in some things you didn't want in pulps, and we had had numerous problems. I had some very definite ideas on ways in which pulp could be improved for manufacture of cellophane.

Q. When you got out there in 1930 how much did Rainier Pulp and Paper Company know about the chemical requirements for rayon and cellophane pulps?

A. They knew practically nothing. They had had some very slight assistance from the man we had formerly sent out for a few months period but were very far from being established as a rayon or cellophane pulp producer.

Q. Well, wasn't information of these chemical requirements freely available from any rayon manufacturer to the pulp company?

A. No, it was not.

Q. It has been stated here that all that was necessary to produce a dissolving pulp by Rainier Pulp and Paper Company was to alter the process a little bit and the pulp was
9072 suitable. You try to go back to when you arrived on the West Coast from 22 years ago and tell us what you had to do to get a satisfactory pulp coming out of the Rainier mills?

A. There are a great many problems involved in that matter. It is not easy to make a cellophane or rayon pulp of good quality. First of all, you must have reliable analytical methods, a good control department; you must have research and development work and you must have equipment which will give you a uniform product, as well as a product of high quality as measured by chemical standards, not the normal standards of the paper pulp industry.

9073 Q. Would you explain a little bit what you mean by chemical standards not the normal standards of the paper pulp industry?

A. The requirements of the paper pulp industry, generally speaking, are for strong pulp fiber, the type of fiber that would have a high fold resistance and a high strength and a high tear and a good color. Those are physical characteristics largely. In rayon or cellophane manufacture, you are interested in the chemical properties, not the physical properties of the fiber, because in the subsequent steps of conversion to rayon or cellophane, the fiber is entirely dissolved.

Q. How long was it after you got there that any pulp was produced that you thought fit for shipment for use around a cellophane plant?

A. A very, very small quantity was shipped the latter part of 1930, and the pulp was not too good. In 1931 we did get fairly large samples that could be commercially tested, or tested beyond the scale of a semi works, and we did finally at that point hit upon what was an acceptable quality by the standards of that day.

Q. After your arrival out there, did you receive any further technical assistance from du Pont?

9074 A. Yes. I continued to get technical assistance throughout the life of that agreement.

Q. In what form was this technical assistance that you continued to get?

A. It was in many forms. Some was in supplying us complete reports of tests on products that we had sent in to du Pont plants for tests, particularly on a commercial basis. Those were the most important. Some of it was by contact, frequent visits to the various du Pont plants. Some by telephone.

Q. Did any du Pont technical people come out to work in the Rainier Pulp and Paper plants?

A. We had visits from a number of du Pont people: Dr. Benger, for one, and Mr. Bradshaw.

Q. Who is Mr. Bradshaw?

A. Mr. Bradshaw succeeded me as chemical director at Buffalo.

Q. Did you or people other than Rainier people make trips to du Pont laboratories?

A. Yes, very frequent trips.

Q. Were you given free access to information there?

A. Yes.

Q. Was there ever a time when du Pont assisted you in setting up testing equipment for rayon?

A. Yes. That started at the time I left the du Pont Company. I took with me an analytical manual of information
9075 that was considered highly confidential at that time, and that manual was kept up to date over the years; when new methods were developed or old ones discarded, we always got copies of the new methods.

There also was some interchange of samples to show that various laboratories in du Pont's mills and our own were getting the same results from a given sample of pulp.

Q. Did Rainier have a so-called semi works plant for rayon manufacturing?

A. In the beginning we did not. It grew somewhat piecemeal, but we had first laboratory testing equipment, then a large-scale steeping press, and eventually we installed a viscose rayon spinning machine.

Q. What was the source of your information as to the viscose spinning machine in this semi works plant?

A. We were supplied guides and rollers and spinning setups, spinning bath compositions, viscose compositions, and all purification conditions such as were being used in du Pont plants.

Q. You say these were the ones that were used in the du Pont plant. Where did you get them?

A. We got them directly from du Pont.

Q. Dr. Reichel testified a few minutes ago that Sylvania cooperated with your company on pulp. Would you give us some comparison of the technical cooperation received by your,
9076 company from du Pont and that received from Sylvania?

A. Well, they are quite different. We had cooperation from a good many rayon companies and both cellophane companies in the field, in a general way. If you supplied a carload or ten carloads of pulp and it was tried out, you would get an opinion as to whether it was suitable and whether in a general way it should be changed to a whiter color or lower viscosity or some other thing of that sort.

From a chemical standpoint, or research and development standpoint, it was only a superficial guidance.

The assistance of du Pont was very real and very detailed. It resulted in exchange of many small laboratory samples, complete discussion of how they performed under certain conditions, certain du Pont conditions, what we might do to modify them to make them more suitable to fit du Pont's conditions, and it has been said, and I think properly, that the quality of our pulps were guided in the direction of the conditions that du Pont used.

Q. You mentioned commercial tests of newly developed pulps that du Pont did. What was that?

A. Well, you can't tell from a five or ten-pound sample, no matter how complete your analytical work is, how that pulp will perform when you put it into day-to-day operation in the plant.

9077 You can't get any idea of uniformity, and there are many small subtle qualities that will come out in continuous operation in a plant with a large quantity of pulp that you cannot find in any other way. These might consist of, in rayon, plugging of spinnerette holes; in cellophane, whether or not the hopper lips remain clean with certain types of pulp or whether they become fouled quickly with others.

Q. Did any other manufacturer run commercial scale tests for you on new pulps?

A. No. Du Pont was our first testing ground. The quantities of pulp you would send to other customers were—well, they were supplementary tests; they would corroborate what we had found at du Pont.

Q. Dr. Pickens, you said you were familiar with cellophane manufacture when you went to Rainier. What ability did Rayonier have throughout your experience to manufacture cellophane without relying on the information that you took to Rayonier from du Pont and subsequently received from du Pont?

A. They had no knowledge of cellophane manufacture.

Q. Do I understand, then, that they would have had to rely on that information?

A. Yes, they would have had to, or get it from some other source.

Q. Your first contract with Rainier Pulp and Paper, I believe, was for two years?

9078 A. Yes.

Q. Why did you decide to stay at the end of 1932 when your contract expired?

A. In this two-year period we had been quite successful in developing acceptable pulps for rayon and cellophane. It seemed like a good opportunity, as though we could expand our capacity

very rapidly. So it was desirable from that standpoint, as well as remuneration to myself, to stay there.

Q. After you had started making dissolving pulp at Rainier Pulp and Paper Company, what was the progress in terms of mills and output and sales demand that Rainier Pulp and Paper experienced?

A. In 1930 I think the total amount of pulp that was shipped, cellophane pulp, at least, and those were the pulps first evaluated, the total amount in 1930 was less than 300 tons. By 1931 I think that had gone to an order of 10,000 tons, and by 1933—1932 to 1933—we could see that the entire output of the Shelton mill, which was the Rainier Pulp and Paper Company mill, would all be taken up with rayon and cellophane pulp manufacture.

At that point, Mr. Mills, having control of these three associate pulp mills, could easily arrange, and did, for the Olympic Forest Products Company to manufacture rayon and cellophane pulp
9079 under Rainier Pulp and Paper's direction. It was not very long before that mill also was filled with rayon and cellophane pulps, aside from some very long-term commitments for paper pulp, 20-year contracts. So we moved into the third mill, the Grays Harbor pulp and Paper Company, where similar to rayon and cellophane pulps were produced under Rainier Pulp and Paper Company's direction.

All these Pulps made in the various mills were evaluated at various times by du Pont on a laboratory and commercial scale.

The COURT. Mr. McGlothlin, the witness uses the word pulp. Does he mean that flat substance we saw?

Mr. MCGLOTHLIN. Yes, sir.

By Mr. MCGLOTHLIN:

Q. Doctor, would you tell us the form in which you ship pulp to a rayon or cellophane plant?

A. There are two general forms of package, but only one form of sheet. It looks like a white cardboard. It is sometimes cut to specific sheet size to fit presses, or is put in some cases in rolls for continuous operation.

Q. Can you tell us in terms of output what your company's rank is as a manufacturer of dissolving pulps in the United States now?

A. We are the largest producer in the United States, and have been for many years. We had a fortunate situation in being
9080 able to convert three going paper pulp mills into rayon pulp mills in a very short period of time.

Q. When would you say that you achieved leadership production-wise?

A. I would say by 1934 or 1935. I believe we were the world's largest producer then, and we have maintained that position ever since.

Q. How many mills do you have now?

A. We have four now.

Q. Do you have plans for a further one?

A. Yes. We have started work on a fifth mill to be located in Georgia.

The COURT. Incidentally, where are the others?

The WITNESS. The fourth mill is at Ferendina, Florida. It started out, I believe, originally as Ferendina Pulp and Paper Company but quickly became a part of the consolidation of Rayonier, Incorporated.

Q. And the three original mills are those on the West Coast?

A. The three original mills are in the state of Washington: Rainier Pulp and Paper, Grays Harbor, and Olympic Forest Pulp and Products Company.

Q. When were those three merged into Rayonier, Inc?

A. They were consolidated in the fall of 1937.

Q. What type of dissolving pulp is the heaviest production item now of Rayonier?

9081 A. Today, by some slight margin, the greatest amount is for an acetate rayon pulp, which is perhaps the most intricate to produce. The next highest demand is for a pulp for tire cord.

Q. Is that the type of rayon that du Pont calls Cordura?

A. No. The pulp we call Rayocord because the yarn they make it from is Cordura.

Q. How long did Mr. Mills remain as the principal officer of the company?

A. He remained as president and chairman until 1943. He retained his chairmanship, I believe, until 1947, and died in 1950.

Q. When you went to Rayonier what was the organizational setup as between production and the rest? Who was head of production? Who was head of chemical and technical matters, and who was head of finance, and that sort of thing?

A. There were three separate entities, with Mr. Mills being president of all three. Under the president was a general or resident manager and a control laboratory. There was a secretary and treasurer located in San Francisco. I carried the title of Chemical Director, and while I was employed by Rainier Pulp and Paper only, I was used in a consulting capacity by all the mills and it was not long through this arrangement of hav-

9082 ing other mills produce rayon pulp and cellophane pulp before I had very active responsibilities in all three.

My position was set apart a little bit, and I reported directly to Mr. Mills with the power to veto over anything having to do with quality, at least.

Q. To what extent were you consulted with respect to any new products that the company might undertake manufacturing?

A. I had charge of all the technical work and was consulted on any new project that might have any chemical flavor whatever.

Q. Is Mr. Mills still alive?

A. No. He died in 1950.

Q. Are you familiar at all with the contract between du Pont and Rainier executed in 1930, which is government exhibit 4,008?

A. Yes, I am generally familiar with that.

Q. The contract provides as to certain kinds of pulp that Rainier shall make payments to du Pont, does it not?

A. Right.

Q. Can you tell us whether or not that was a device to give du Pont an inside price?

A. No, that was not, I am sure.

Q. How do you know it was not?

A. Well, it is too difficult a matter to establish yourself in
9083 rayon and cellophane pulp manufacture to have it be that easy. It is a very difficult problem and it calls for someone with considerable skill and knowledge of the requirements of a rayon or cellophane pulp.

Q. Article 15 of the contract, Dr. Pickens, which I show you, requires your company to keep confidential all the information received from du Pont pursuant to the contract. Has your company observed that?

A. Yes. We have observed that strictly, always.

Q. It also provides that the information shall not be used for any purpose other than the manufacture of pulp. Do you see that?

A. That's right.

Q. Have you ever used that information for any other purpose?

A. No. We have used it only in the development of better rayon and cellophane pulps.

Q. Taking the period up to Mr. Mills' death, Dr. Pickens, what consideration, if any, was ever given by your company to the manufacture of cellophane?

A. I know of no consideration that was given to manufacture cellophane.

Q. Can you tell us what the general financial condition of the company was in that period with respect to funds for expansion? You mean prior to 1950?

9084 Q. Yes, starting in 1930 to 1950.

A. We never had enough funds to do all the things that we would like to have done.

Q. In connection with what?

A. Well, principally in expansion of capacity. We did spend large sums on improving quality. If we had had more funds, we perhaps would have spent even more in those directions.

Q. Capacity for what?

A. Production of pulp.

Q. Throughout that period what was the relationship of the demand for your company's pulps and the company's ability to supply the demand?

A. Well, except for two or three very brief periods, we were sold out throughout the entire period, throughout this entire 22 years. We have almost always been in short supply and could have widened our markets if we had had more capacity.

Q. Was there a time, Dr. Pickens, when your company engaged in research on a transparent film with a cellulose base?

A. Yes, we did.

Q. Will you tell us about that?

A. That was a development the fundamental purpose of which was to find new outlets or new demands for the special types of pulps we manufactured. We thought we saw an oppor-

9085 tunity to produce a lower cost fiber of film by a cuprammonium process. The thallium is dissolved in cuprammonium solution and then converted to film.

We did quite a lot of work on that. We were quite successful in adapting pulp to that use.

Q. Did you engage in the manufacture of that film?

A. No, we did not. We carried on research to a point that the process could be offered to customers. We felt that the rayon or cellophane manufacturers should take it up from that point on.

Q. Did you offer it to anyone, the process?

A. Yes, we did.

Q. To whom?

A. We offered it to du Pont, to American Bemberg and its affiliate, North American Rayon. They have an interlocking management. It was offered also to American Viscose and Sylvania, I believe.

Q. Did you regard Article 15 that I showed you as any bar to your manufacture of this film you developed?

A. No.

9086 Q. Can you tell us what low-viscosity pulp is, Doctor?

A. It is a pulp which when dissolved gives a solution of low viscosity, an easy-pouring solution.

Q. Does it have any advantages for cellophane or rayon manufacture?

A. Yes, it does. It has rather specific advantages in cellophane manufacture, and perhaps some for stable fibre manufacture as well.

Q. Was that a type developed by your company?

A. We were not the first to develop it. The suggestion that we develop a low-viscosity pulp for cellophane came from Dupont, and after some work we were succesful in getting a product that gave good results.

Q. Was there any cooperative work on low-viscosity pulp between you and Dupont?

A. Yes, all the time. The suggestion first came from them. We devised a means whereby we would lower the viscosity and immediately sent Dupont samples first, and the usual way would be a ten-pound sample, to be followed by a commercial run; and because Dupont cooperated closely with us we could get these commercial runs without the normal delay and hesitation that other customers exhibited.

Q. How much low-viscosity pulp did your company make in 1951, do you know?

A. I would say 80,000 tons, thereabouts.

9087 Q. To whom was it sold?

A. Largely to Dupont and Sylyania. Some to other industries.

Q. Have there been any restrictions on your sale of pulps to which Dupont's technical knowledge contributed?

A. No, there was no restriction.

Q. Coming to 1945, Doctor, in the rayon industry had there been any change in the secrecy of processes and so forth as compared with 1930 when you went to Rayonier?

A. Yes; the whole viscose industry has become more open; secrets that various customers had, eventually it was discovered they all had the same secret, or many of them were the same. But there has been a distinct change since 1930.

Q. In that connection, and in connection with your obligation to keep Dupont information secret, from time to time do other rayon manufacturers visit your plants?

A. Yes, they do, occasionally.

Q. What do you do with your semi works when another rayon manufacturer's representative comes through the Rayonier plant?

A. Before the spinning machine, where we sometimes may be spinning a tire yarn by a Dupont Cordura spinning set-up, we will cut down and dismantle the machine, or convert to just an

ordinary conventional method of spinning, so that that information is never revealed.

9088 Q. What does Rayonier now manufacture, other than dissolving pulps for chemical purposes?

A. Well, dissolving pulps is a rather broad term, has become a rather broad term. We manufacture, under the dissolving field, an acetate pulp, a tire yarn pulp, a standard viscose pulp, a cellophane pulp, a pulp for nitration purposes, and during the war we supplied very large quantities for propellant powder. We have manufactured some small quantity of paper pulp throughout the years. We manufacture bond papers as well, and we have done that at the Grays Harbor mill since the time that mill started.

Q. Now I want to go back for a minute to 1932. Did you in or about 1932 make a trip to Japan?

A. Yes, I did; I went there in the fall of 1932.

Q. While there did you have any opportunity to observe Japanese cellophane manufacture?

A. Yes; I saw a small plant in operation.

Q. Will you tell us something about the Japanese cellophane plant in 1932?

A. Well, it was not a very good plant. It made about one or two tons a day, on a machine with a hopper lip that was, I would say it was, maybe twenty-four or thirty inches wide. It dried over a couple of rolls, and it made a very inferior grade of cellophane.

But they were manufacturing at that time.

9089 Q. What was their production of so-called slit rolls?

A. I don't think they made any slit rolls. There is so much hand operation in Japan anyway, that as near as I can recall it would be cut into sheets and then handled by hand or wrapped by hand from there on.

Q. Can you give us the approximate total of payments made by Rayonier to Dupont for technical service?

A. A rough figure—and this is very rough—would be $1,300,000 over that fifteen-year period.

Q. The government has stated that the payment made by Rayonier to Dupont for technical service was quite excessive. Will you give us Rayonier's views as to whether or not those payments were excessive?

A. Well, I would say the payment in total was very modest. We spend nearly that amount every year today for research work, just to improve the pulps that we now manufacture. I stated before that it is a difficult problem for a pulp manufacturer to establish himself as a good rayon and cellophane producer.

Q. Can you tell us to what extent the information you carried with you and the information you subsequently received from

Dupont contributed to your company's success as a manufacturer of dissolving pulps?

A. It is difficult to evaluate that in terms of dollars
9090 I am sure that it enabled Rayonier and the associated mills to get into rayon and cellophane production years sooner than they would have otherwise, and to make products that led the world in quantity and in quality.

Q. The government contends, Doctor Pickens, that the assistance that Dupont gave was that that any manufacturer would give to anyone to improve a raw material. Has that been your experience?

A. No, it has not. We got a great deal of confidential information and advice. I carried quite a bit of experience with me when I left, and Dupont continued to keep us up to date and to furnish the facilities for commercial evaluation of any new products that we brought out.

Q. The government has also contended that the type of information that Rayonier received was comparable to the information that Riordan received from Dupont during the period you were chemical director at Dupont. Is that true?

A. Oh, no. They are not in the same class at all.

Q. Doctor, are you familiar with the viscose that is used in the production of viscose rayon?

A. Yes.

Q. And with the viscose that is used in the production of cellophane?

A. Yes, I am.

Q. How long does your experience with those two types
9091 of viscose extend? From 1925 forward, is that it?

A. Yes; from the time I started to work with Dupont.

Q. During that experience has viscose for viscose rayon ever been used commercially to produce cellophane?

A. Not exactly. There might be a period when viscose compositions changed. In the Dupont Company particularly they have standardized on one type of viscose for viscose rayon manufacture, I guess, for twenty-five or twenty-seven years. For cellophane manufacture the composition has changed, for reasons of improved technique, and to get lower costs and to utilize hemicelluloses and to lower chemical consumption.

Q. When you were chemical director at Buffalo did the viscose used for viscose rayon differ from that for cellophane?

A. Yes, the two were different.

Q. And I take it that your testimony is they are different today?

A. They are different today. It is possible, if you want to go through some viscose gymnastics, certainly you can take a rayon

viscose and make a cellophane from it, but it will not be the most economical process.

9092 Q. How do they differ, the two viscoses, in what par- factors?

A. Well, in composition; the cellulose content is different; the ratio of caustic to cellulose is different, and in all instances cellophane having a leaner use of chemicals than for the rayon field.

Mr. McGLOTHLIN. Your witness.

Cross-examination by Mr. ROACHE:

Q. Dr. Pickens, just to get this straight again, when did you first go to work for Rainier?

A. In June, 1930.

Q. That was before the agreement between Rainier and du Pont, is that right?

A. That is before that agreement was signed.

Q. Did you take part in the negotiations?

A. No, I did not enter the negotiations except that I had a temporary personal agreement with Mr. Higgins operating for Rainier that covered this interim period prior to the time the du Pont-Rainier contract was signed.

Q. Your position with du Pont, which commenced in 1925, was first in rayon, is that correct?

A. That is correct.

Q. Was the rayon and cellophane research all one program?

9093 A. No; there were different phases, different problems within the chemical division.

Q. How long were you in the rayon research?

A. I would say, oh, a year and a half, the first year and a half or possibly two years.

Q. And you say when you went to du Pont there were twenty men at that time doing research work in rayon?

A. As I recall, on that order.

Q. Do you know how long those men had been with the company?

A. Oh, for varying times. You mean for the du Pont Rayon and Cellophane Companies? Not very long.

Q. Research and Rayon Companies.

A. Not very long, because the company first started rayon production, I think, only about three or four years prior to that. Many of them were du Pont employees.

Q. Well, two or three years? Four years?

A. I think rayon production started about 1922, 21 or 22, and cellophane sometime in '23.

Q. And you feel they had more than two men at that time in rayon research?

A. In '25?

Q. '24.

Mr. McGLOTHLIN. Could we have the time fixed. I am not sure he is still talking about '25.

9094 Mr. ROACHE. '24 I am talking about.

Mr. McGLOTHLIN. That is before he went with the company.

Mr. ROACHE. He has testified he knew how long these men were there.

The WITNESS. I didn't say that all twenty— I didn't mean to say that all twenty were there.

By Mr. ROACHE:

Q. But there were more than two men?

A. I don't know how many men there were prior to 1925. I know that Dr. Benger, who hired me, had been there for a period of some months, maybe over a year. The division was in a highly formative state then, was being built up, and it was not many years before we had 120 people in the division.

Q. Did they hire 20 men within a year, between '24 and April, of '25?

A. That I wouldn't know.

Q. When did Rainier get the most cooperation and technical assistance from du Pont? At what years? Could you pin that down?

A. I don't think you can pin it down. Probably the information that got us started on a commercial-going basis might be considered more valuable in a sense, but as we expanded production du Pont became a bigger customer, too, and our stake in the

9095 rayon and cellophane fields increased, so that smaller improvements in later years might have the same value to our company as larger improvements in earlier years with smaller sales.

Q. On direct you stated that you considered the amount of money, the rebate you gave to du Pont, was very modest as compared to the assistance they gave you?

A. I thought I said it was a modest fee in comparison to the value of their assistance.

Q. Do you remember my visit with you about two years ago?

A. Yes.

Q. Do you recall at that time that we discussed this very matter, and it is my recollection, Dr. Pickens, that you told me that it would be hard to say whether it was a fair return or not? It

depended on the viewpoint. From your side of the fence it might be excessive; from their side, not enough?

A. I don't think that it was ever considered by our people an excessive payment.

Q. Do you recall making that statement to me?

A. No, I don't.

Q. Do you recall that I made a request at that time for your company to compile some statistics furnishing the anti-trust division with the amounts of rebates you had given to duPont over the years?

9096 A. Yes.

Q. I show you a document addressed to me in the Anti-Trust Division from Rayonier signed by Robert L. Lingelbach—is that his signature [showing document to witness]?

A. Yes.

Q. That is from your company?

A. That is right.

Q. This has a sales price of bleached sulphite pulp for cellophane and other cellulose products; it contains a table giving the fee for technical service paid to du Pont as provided under the agreement of September 27, 1930?

A. Right.

Q. Do you feel that the statements therein are true?

A. To the best of my knowledge they are, yes.

Mr. ROACHE. I would like to have this marked for identification Government Exhibit 4451.

(Letter from Rayonier to Philip Roache dated February 10, 1950 and attachment was marked "Government Exhibit No. 4451 for Identification".)

By Mr. ROACHE:

Q. Here is another letter from Mr. Lingelbach of the Rayonier Company to the Anti-Trust Division. Is that his signature?

A. It is.

9097 Q. Do you feel that is from your company?

A. Yes.

Q. And it contains the sales prices of sulphite pulp for cellophane and other cellulose products sold to du Pont and Sylvania. Do you feel the statements therein are true? I have particular reference to—well, this is the same one I just gave you.

This is the second letter I had reference to from your company, signed by Mr. Lingelbach; is that his signature [handing document to witness]?

A. Yes.

Q. Are the statements therein true as contained in that covering letter?

A. I believe that is correct, yes.

Q. Paragraph number 4 in this letter states, "At no time has Sylvania Industrial Corporation received any rebate from Rayonier." Is that correct?

A. I believe so, yes.

Mr. ROACHE. I would like to have this marked for identification as Government Exhibit 4450.

(Letter from Rayonier, Incorporated, to Department of Justice, dated March 3, 1950, with attachment was marked "Government Exhibit No. 4450 for Identification".)

By Mr. ROACHE:

9098 Q. In the first document I handed you, marked for identification Government Exhibit 4451, there is contained the fees for technical service, and in 1931 it was $28,492.91, is that correct?

A. That is right.

Q. And it progressively increased until 1940 when it was $149,059.28?

A. That is right.

The COURT. We will adjourn until tomorrow morning at 10 o'clock.

(At this point the trial was adjourned to Thursday, April 10, 1952, at 10:00 o'clock a. m.)

9099 THURSDAY, APRIL 10, 1952, 10:00 O'CLOCK, A. M.

Present: As before noted.

RUSSELL M. PICKENS (Resumed).

CROSS-EXAMINATION (CONT.)

Mr. ROACHE. As we left off yesterday, your Honor, it had been brought out in cross-examination from one of the documents marked for identification that Dupont had received from Rainier in 1931 $28,492.91 rebate; in 1940, $149,059.28.

By Mr. ROACHE:

Q. Dr. Pickens, will you read what the rebate was in 1943 and 1945?

Mr. MCGLOTHLIN. If your Honor please, you understand this is our position: This is not a rebate; it is a fee paid for technical services. I am not going to object to the characterization each time.

A. In 1943, $163,022.20; in 1945, $144,945.65.

By Mr. ROACHE:

Q. Now, isn't it correct that in your direct testimony you stated that the assistance and cooperation in later years might have been of the same value as of the earlier years?

A. That is right, yes.

Q. Yet the rebates for technical services, money paid, or whatever you want to call it given in the later years were
9100 more than five times that given in the earlier years; isn't that true, Doctor?

A. I believe that is right, yes.

Q. So actually the rebates were based on the volume of purchases and not on any acts of assistance given?

A. I think the document—the agreement states it is on a per ton basis.

Q. Take the period from 1940 to 1945. Are you able to relate the amount paid in rebate in any particular year to the amount in value of any information received from Dupont?

A. I can't relate specific instances. You mean examples of help?

Q. That is right.

A. There undoubtedly were many examples where we were given technical assistance during those years, because it was more or less continuous throughout the entire fifteen-year period.

Q. But you can't relate any specific assistance to any specific amounts of money?

A. No.

Q. Just for the record, what is Mr. Linglebach's position with Rayonier?

A. He is Secretary of the company.

Q. Dr. Pickens, did you have a secret agreement with Dupont when you left their employment and went over with
9101 Rainier?

A. No, I did not.

Q. One of the Government exhibits now in evidence in this case speaks of you, Dr. Pickens, holding to an agreement you had with Dupont. There is no mention of such an agreement between you and Dupont in the agreement. What was that understanding you had with Dupont?

The COURT. What is the exhibit? Identify it and show it to the witness.

Mr. ROACHE. Government Exhibit 4446.

The COURT. Show it to the witness so he will have an opportunity to see if his recollection can be refreshed.

Mr. ROACHE. Yes, sir.

A. I mentioned yesterday an interim agreement, that letter from Mr. John C. Higgins to me which was given me at the time

I left Dupont on June 8th, I believe, 1930. That was an interim agreement to serve during the period these negotiations were still on concerning the Dupont-Rainier agreement. That letter was supplanted by an agreement directly with Rainier.

Q. But that document stated that in addition to that if you held to your agreement——

A. That is right.

Q. So that means there were two and that the other one did not supplant your original one.

9102 A. There was this interim one followed by another one.

Q. What was this understanding you had?

A. It was a contract with Rainier, a personal contract with Rainier.

Q. What was it about?

A. It involved salary matters, it involved my right to return to Dupont within a two-year period.

Q. When you did experimental work or Dupont cooperated with you in experimental work was that not secret information between both companies not to be divulged to other parties?

A. That is right.

Q. And wouldn't that not be true also of any cooperation with Sylvania?

A. The cooperation with Sylvania was on a different basis, as I explained yesterday?

Q. What was that?

A. We didn't go through their plants as we did through Dupont's plants. We were not through their semi-works. We might be called into specific portions of customer's plants in times of trouble when the quality of pulp was under suspicion, but the relationship was entirely different.

Q. Granting all that, if you ran any test for Sylvania they would not expect you to divulge that to anyone else, would they?

A. No.

9102A Q. Yet you did divulge that information to Dupont, did you not?

A. No, I don't believe so.

Q. Do you recall a meeting on November 1, 1938, in Dr. Heyden's office, with several Dupont officials, wherein you gave them information you made on tests of Sylvania film?

A. I remember some discussion. It may have been a comment on filterability, or maybe it was a film. I don't remember the details.

Q. Was it anything to do with samples of viscose that they had sent to you and you reported to Dupont the jell count in it, and that they had improved their film?

A. That's right.

Q. And that they had switched from Frazier pulp to another kind of pulp?

A. Yes. I don't consider that confidential information.

Q. Maybe Sylvania might have. Would you repeat again for the record and for our information the total amount received by Dupont in rebates?

A. I can't give you the exact figure.

Q. Did you not say it was approximately $1,300,000?

A. That's right.

Q. Isn't it true that considering the course of the years, that was a fifteen-year period, that Dupont received that sum of money which Sylvania did not receive?

9103 A. That's correct.

Q. And to that extent Dupont was at an advantage in their purchases of pulp?

A. Yes, I would say that.

Q. One additional point. With all this cooperation, didn't Dupont get any advantage from that? Weren't they able to increase their efficiency in their plant, get better cellophane? Didn't they receive that kind of benefit from it?

A. Yes, that was the purpose, to make better pulp.

Q. For the benefit of Dupont was the whole purpose of it, wasn't it?

A. Well, it resulted in benefit to the industry.

Q. Article 15 of this agreement of September 27, 1930, between Rayonier and Dupont states that the pulp company, meaning Rayonier, agrees that all information obtained from Rayon Company will be kept confidential, and that none of the information and data obtained from the Rayon Company will be used for any purpose whatsoever except for the manufacture of pulp. Is that correct?

A. That is correct.

Q. Did you use that information for any other purpose except for the manufacture of pulp?

A. No, not that I can recall.

Mr. ROACHE. That's all.

9104 Redirect examination by Mr. MCGLOTHLIN:

Q. You testified yesterday that you went on a trip to Europe in 1929 and saw rayon and cellophane plants in various countries. In what countries did you see cellophane plants?

A. I saw two cellophane plants in La Cellophane Company in France. I saw an affiliated plant in Germany named Kalle & Company.

Mr. MINICUS. Objection to this type of testimony. It is entirely beyond the scope of the cross-examination.

The COURT. Under what rule?

Mr. MINICUS. The Federal rule that confined redirect examination to the scope of the facts brought out on cross-examination. There was no mention of these trips or foreign cellophane or anything else on Mr. Roache's cross-examination.

The COURT. Well, he can go back to his direct examination if there is any point he wants to elaborate. I never heard of such a rule.

Proceed, Mr. McGlothlin.

By Mr. MCGLOTHLIN:

Q. Dr. Pickens, you testified on cross-examination that the technical assistance led to improvement in pulps and consequently in manufacture from such pulps, is that correct?

9105 A. That's right.

Q. Were those improvements available to any purchaser of pulp from your company?

A. Yes. Immediately an improved pulp was developed, that was made available to the industry as a whole.

Q. By industry do you include Sylvania?

A. Yes.

Q. Do you include other rayon manufacturers?

A. Any rayon or cellophane manufacturers.

Q. Do you include anybody you sell pulp to, in other words?

A. That's right.

Q. You were asked about assistance your company received, I believe in the period 1940 to 1945, and you were unable to state any specific example. I want to show you Defendant's Exhibit 634 and see if that refreshes your recollection as to any technical assistance you were receiving in that period?

A. Yes, it does.

Q. Tell us what that assistance was?

A. We received complete information on viscose and spinning bath compositions. We received special type roller guides and diagrams of spinning set-ups to duplicate the set-ups in use in Dupont's plants on manufacture of Cordura.

Q. Will you tell us what Cordura was?

9106 A. It is Dupont's trade name for a tire yarn or cord yarn.

Q. Let's say prior to 1940, are you familiar with the raw material from which the viscose was made for such a product? Was it pulp, cotton, or what was it?

A. Largely cotton linters. It varied company by company, but cotton linters was the predominating raw material.

Q. Will you explain to us what you mean by cotton linters?

A. The cotton linters is a fuzz that remains on the cotton seed after the staple cotton is removed in a ginning operation.

Q. Does your company sell cotton linters?

A. No, we do not.

Q. During the period 1940 to 1945 were you able to develop a wood pulp that was suitable for Cordura production?

A. Yes, we were.

Mr. MINICUS. Is it understood, your Honor, that I have a continuing line of objection to all of these questions on the grounds stated before?

Mr. MCGLOTHLIN. The cross-examination brought out that there was no specific example in the period 1940 to 1945, and I am bringing out a specific example.

The COURT. The objection is overruled.

9107 By Mr. MCGLOTHLIN:

Q. Of what importance was that pulp in your sales during that period?

A. It became gradually more and more important until today it is the second in quantity of production.

Mr. MINICUS. If your Honor please, may I have a reading of the question before this last one?

(The Reporter read the question referred to as follows:)

"Question: During the period 1940 to 1945 were you able to develop a wood pulp that was suitable for Cordura production?

"Answer: Yes, we were."

Mr. MINICUS. Objection as irrelevant.

The COURT. Same ruling. Proceed.

By Mr. MCGLOTHLIN:

Q. Was this pulp sold to other manufacturers of rayon or tire cord?

A. Yes.

Q. Can you tell us the nature of the assistance you got from Dupont in the development of a wood pulp suitable for tire cord, rayon?

A. We had evaluations on a semi-works basis, and on plant basis as well.

Q. I believe you said your company now produces as its
9108 most important outlet a wood pulp for the manufacture of acetate rayon, is that correct?

A. That is correct.

Q. When was that pulp developed?

A. In very, very small quantity as early as 1936, I believe, but it did not become an important commercial commodity until about the time we entered the war.

Q. Around 1941?

A. 1941, yes.

Q. What had been used, what raw material had been used, for the cellulose in acetate rayon up to the development of such a pulp?

A. Cotton linters had been used exclusively.

Q. Can you tell us whether or not Dupont contributed to the development of a pulp for acetate rayon?

A. Yes, they did. We worked closely with the Acetate Division of Dupont in improving the qualities of that pulp.

Q. Dr. Pickens, the Government has stated that its principal contention with regard to your company is that you were excluded from the manufacture of cellophane by this contract, Government Exhibit 4008. What can you say as to that?

A. As I mentioned yesterday, we had difficulty almost continuously over this twenty-two-year period that I was with Rayonier predecessor companies in meeting the orders for our various products. We are still in that position, and that
9109 has occupied our full time and attention and funds.

Q. Can you tell me whether or not the effect of this contract was to exclude you from cellophane manufacture?

A. We never considered it so, and it certainly did not exclude us because we weren't interested in the manufacture of cellophane in any of those years.

Mr. McGLOTHLIN. That is all.

Mr. ROACHE. No questions.

9110 JOSEPH C. FEAGLEY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McGLOTHLIN:

Q. Will you give us your full name, Mr. Feagley?

A. Joseph C. Feagley.

Q. What is your position?

A. I am a vice president, director, and general manager of Glass and Closure Division, Armstrong Cork Company, Lancaster, Pennsylvania.

Mr. McGLOTHLIN. If your Honor please, I will relate this as usual to the complaint. Mr. Feagley is appearing pursuant to subpoena. He is the principal officer of the section of Armstrong Cork Company which is concerned with closures. We were advised, pursuant to your Honor's direction, officially on March 31, that the Government alleges that Armstrong was an excluded competitor from the manufacture of caps and bands. The pertinent complaint paragraphs are 32 and 36 (b).

Mr. MINICUS. Just for the sake of accuracy, your Honor, may we say that we understood that we had informed him that Armstrong was excluded as a potential competitor, not a competitor.

The COURT. Well, according to your legal theory, there is no distinction, is there?

9111 Mr. MINICUS. Not in law, no.

The COURT. So I may follow this testimony, will you define for me, according to the Government's theory, what is a potential competitor?

Mr. MINICUS. A potential competitor, in our opinion, your Honor, is one who is not presently engaged in the particular operations under discussion or investigation, but one who could possibly, because he was a manufacturer of similar products or had some other interest in the field, in the future could become a manufacturer of the particular product we are discussing here of cellophane.

The COURT. That is very interesting. If a person who could manufacture similar products is a potential competitor, what of the man who actually manufactures similar products? I am trying to get you down now to the basic principle.

Mr. MINICUS. Yes. Of course, this matter of similar products brings it closer, but it isn't absolutely necessary that he manufacture a similar product, for the term "similar products" itself is one of very broad definition. If we take the case here where Olin has recently come into the industry, Olin manufacture basically explosive powders. Now, if we go far enough back, there is a general family relationship in the cellulose groups between

9112 explosive powders and cellophane. It is pretty far removed; however. You can't say that they manufactured products that were too similar, but in the end they were and did come into this industry as manufacturers.

The COURT. All right, proceed, Mr. McGlothlin, with your testimony concerning the exclusion of this particular potential competitor.

By Mr. McGLOTHLIN:

Q. Mr. Feagley, when did you join Armstrong Cork?

A. In the year 1913.

Q. And when did you first have anything to do with cellulose cap or band activities of Armstrong Cork?

A. In the early part of 1939.

Q. What was your position from 1932 to 1934?

A. I was a department manager within what was then known as the closure division on Crown beverage caps.

Q. That is the crimped on metal cap that goes on such things as soft drinks, is it not?

A. And beer bottles.

Q. Then from 1934 to 1939 what was your position?

A. From 1934 to 1939 I was assistant to Mr. Dwight Armstrong, who headed up the then closure division. 1934 was the start. After we acquired a couple of glass plants, why, it became the glass and closure division, and that takes us into the year 1939.

Q. And you have been head of the glass and closure?

9113 Redirect examination by Mr. McGLOTHLIN:

Q. Mr. Feagley, this contract of January 7, 1942, GX 5290, would you look at it and tell us when it terminated.

A. That terminated on December 31, 1944.

Q. Mr. Feagley, has your company ever engaged in the manufacture of viscose?

A. No.

Q. Has it ever engaged in the manufacture of any cellulosic product?

A. That is a broad term. We make rag and felt. Is that cellulosic? We do that for linoleum packing.

Mr. GESELL. What I wanted to do next, Your Honor, was to develop the status of the record on the question of tariff. We have it in evidence that there was a 45 per cent ad valorum United States rate of duty on imports of sheets, bands, and strips of cellophane under the Tariff Act of 1930. Now, that rate has been reduced, effective October 1, 1951, to 22½ per cent ad valorum. I have in my hand a memorandum on the reduction which cites the various statutes and the various trade agreements operative under the amended act which reduced the tariff by that amount,

9114 and what I would like to do, with Your Honor's permission, is to insert a copy of this memorandum in the transcript and ask your Honor to take notice of the various statutes and treaties that are there set forth, so that we may have it of record that this tariff did reduce to the extent I have indicated as of Ocober 1, 1951.

Mr. MINICUS. May I suggest that this is all new to us, and perhaps we can have an opportunity to look this over over the week end.

The COURT. I was going to suggest that if you have an opportunity to look it over, you may agree that the tariff has been lowered. That will avoid the necessity of my reading all of this additional material.

Mr. GESELL. I will hand a copy of this to Mr. Minicus.

The COURT. I will take it up the first thing when we resume next Wednesday.

Mr. GESELL. Very well, Your Honor.

The COURT. Have you anything further?

Mr. MINICUS. Not a thing, sir.

The COURT. Well, I wish you both a nice holiday, and we will recess this case until Wednesday, April 16, at ten o'clock.

(At this point the trial was adjourned to Wednesday, April 16, 1952, at 10:00 A. M.)

* * * * * *

9116 WEDNESDAY, APRIL 16, 1952, TEN O'CLOCK A. M.

Present: As before noted.

Mr. MINICUS. Friday afternoon, your Honor, you suggested that the Government look over this submittal by Mr. Gesell relative to the tariff matter. The Government is very happy that it is finally able to provide Mr. Gesell with a concession that he has been seeking since the beginning of the trial. Therefore the Government will concede that in 1951 it considered 45% ad valorem too high, and the tariff on cellophane was cut to 22½%.

Of course, there is no concession going with that. The 22½% ad valorem still permits cellophane to come into this market at a price comparable to that sold domestically.

If Mr. Gesell wants to put this in, it is quite all right with us, but it is quite a lengthy document and I think the ultimate fact we are after, the reduction of the tariff, has been conceded.

The COURT. Well, is that concession a good or bad omen?

Mr. MINICUS. I don't think it makes a bit of difference.

The COURT. Put it in.

Mr. GESELL. I think in view of the characterization of the
9117 document, it ought to go in, because there is nothing about considering the tariff too high; it is a tariff reduction.

The COURT. Let the document be introduced in evidence.

(The document entitled, "Memorandum on Cellophane Tariff Reduction" was received in evidence and marked, "Defendant's Exhibit No. 1000".)

Mr. MINICUS. The only other matter is of a little more serious nature. We are now ready to continue with the cross examination of Dr. Reichel. I understand that Dr. Reichel is probably a very busy man and would like to have some advance notice. The Government is not anxious that this matter be delayed too long. Therefore we would suggest that perhaps next Wednesday morning, if it is convenient to everybody, would be an appropriate time to proceed with that cross examination.

Mr. GESELL. Well, in accordance with the arrangement, I will get in touch with Dr. Reichel and from the point of view of our schedule, Wednesday morning would be a good day, your Honor, and I will see if that is convenient to him and report back to the Court and Mr. Minicus.

Mr. MINICUS. Thank you very much.

Mr. GESELL. At this time we call Mr. Wendell Swint.

9118 WENDELL R. SWINT, called as a witness on behalf of the defendant, being duly sworn, testified as follows;

Mr. GESELL. Your Honor, Mr. Swint is director of the Du Pont Foreign Relations Department, and he is also a director of C. I. L. He is going to testify today concerning Du Pont's alleged participation in the so called cellophane cartel.

In that conection, your Honor may wish to have for him two of the Government exhibits, one GX 1414 and the other GX 1015.

Mr. Swint will also deal with Du Pont's relation with C. I. L. as to cellophane.

Direct examination by Mr. GESELL:

Q. Mr. Swint, what is your position with the Du Pont Company?

A. I am director of the Foreign Relations Department.

Q. How long have you been employed by the Du Pont Company?

A. Forty-one years.

Q. When did you become director of the Foreign Relations Department?

A. August, 1930.

9119 Q. Can you tell us in a general way what the responsibilities of the Foreign Relations Department are in the Du Pont organization?

A. The Foreign Relations Department acts in an advisory and service capacity on all matters affecting the relationships of the company outside the United States. It acts as an operating department in the administration of numerous subsidiaries and affiliated companies.

Q. That are located outside the United States?

A. Yes, foreign subsidiaries.

Q. You say it is a service and advisory department. Whom does it advise and serve?

A. It advises the operating departments and any other departments or offices requiring our advice.

Q. What was your position immediately before you became director of the Foreign Relations Department in 1930?

A. I was manager of the London office of the Du Pont Company.

Q. How long had you been stationed in London?

A. Since 1924; six years.

Q. After you arrived in London and during the period you were there, up until 1930, in what way did your activities involve cellophane matters?

A. Well, cellophane was one of a very large number of products of the company on which we endeavored to furnish services such as

you would expect from a listening post. We collected technical and commercial intelligence. We reported back to the au-
9120 thorities here on any new cellophane plants, any new products, any improvements that we heard of. We would, if possible, get samples of new products, and send them home for analysis.

Q. Did you have anything to do with the operation of the agreements between the Du Pont Cellophane Company and La Cellophane?

A. No, I did not.

Q. Did you know Mr. Frederick W. Pickard?

A. Very well.

Q. Is Mr. Pickard still alive?

A. No, he died about five weeks ago.

Q. What was Mr. Pickard's position in the company in 1930?

A. He was a director of the company, a vice president, member of the executive committee, and chairman of the foreign relations committee.

Q. Of the Du Pont Company itself, is that right?

A. Of the Du Pont Company.

Q. To what extent did your duties in London, particularly about the time of 1930, bring you into contact with Mr. Pickard?

A. All during the latter part of the twenties, and later, the Du Pont Company had rather numerous financial investments in companies in Europe, subsidiaries or affiliates. Mr. Pickard used to make an annual visit to talk with the people who were man-
9121 aging those companies as well as to renew his acquaintance with other people with whom he did business or had known in the past. I always accompanied him on his visits around Europe.

Q. What did you yourself at that time have to do with the various companies that Du Pont had in Europe?

A. I was a director in ten of them.

Q. Now, directing your attention to the period about January, 1930, do you recall conferences which you and Mr. Pickard had with Mr. Rene Bernheim?

A. Yes, I do.

Q. Where were those conferences held?

A. In Mr. Bernheim's office in Paris.

Q. Who was present at the conferences?

A. Well, perhaps not always the same people but usually Mr. Bernheim and Mr. Charles Gillett, Mr. Pickard and myself.

Q. Can you tell us what the occasion was for these meetings with Mr. Bernheim and Mr. Gillet in January, 1930?

A. Well, Mr. Pickard explained to me when he came over that a rather serious problem had arisen in the relationship between Du Pont and La Cellophane. There had been a lawsuit which La Cellophane had brought against a Belgian company called SIDAC.

As I understood it, the SIDAC company had then formed to manufacture cellophane and had utilized, or had at least
9122 used processes which La Cellophane felt infringed their Belgian patents and had also started their manufacture by what we call commercial espionage, perhaps, in securing the services of a couple of La Cellophane employees who designed and put into operation the SIDAC cellophane plant.

SIDAC then became interested in a company in the United States to manufacture cellophane known as Sylvania.

The lawsuit was fairly long, as I recall, and eventually the SIDAC people offered a settlement rather than let the case go to court, and the settlement which they offered to La Cellophane and which eventually La Cellophane accepted was a participation in the stock of SIDAC by La Cellophane. This made La Cellophane indirect holders of an equity in the American company, Sylvania.

The French themselves recognized that this was contrary to their contract with us under which they had undertaken not to engage directly or indirectly in the manufacture of cellophane in the United States. They realized that it was a breach of contract and were anxious to reach a solution which might be satisfactory to us. Mr. Pickard told me that there had been a good deal of discussion about it in Wilmington and various plans or solutions had been talked over, and he was expecting to explore these with Mr. Bernheim.

Q. Well, is that what took place at these meetings?

A. Yes.

Q. Did Mr. Pickard make any proposals to Mr. Bernheim
9123 or Mr. Gillet for settling the controversy?

A. Yes, he did.

Q. Can you tell us what the first proposal he made was?

A. Well, he suggested to Mr. Bernheim that Du Pont should receive an equity in Sylvania—in other words, certain number of shares of stock to compensate us for the loss which we had suffered by having La Cellophane engage in the manufacture.

Q. And how was that proposal received by Mr. Bernheim?

A. Well, he didn't think much of it. He hold us that SIDAC were constantly whittling him down in the amount of stock he was going to get in SIDAC, and he was very much afraid there wasn't going to be enough left to give us adequate compensation if he shared it with us.

Q. Well, did Mr. Pickard then make any further proposals or alternative proposals for settling the controversy?

A. Yes.

Q. What proposal did he make next?

A. He suggested to Mr. Bernheim that La Cellophane should amend their license agreement with us in such a way as to leave us free to export cellophane to all the countries of the world.

Q. What was Mr. Bernheim's reaction with respect to that proposal?

A. He felt we were opening our mouths rather wide, I think.

9124 He said that was a very important part of their business and of their potential business in the future; he felt cellophane was going to grow in use throughout the world, and he said he couldn't agree to that.

Q. Did Mr. Bernheim make any counter proposal with respect to export rights?

A. Yes. He said he thought that that principle was probably the best avenue of approach, and he said perhaps something could be worked out along the lines of leaving us free to export to South America and Japan.

Q. Well, were you able to reach an agreement with Mr. Bernheim with respect to export rights to South America and Japan at that time?

A. Not at that time.

Q. And why weren't you able to?

A. Well, Mr. Bernheim's idea of this proposal was that La Cellophane would establish a certain volume of business to which they were entitled in those areas, and that half of that business would be supplied by Du Pont.

The difficulty he found was that there had been some conversations apparently, as I understood from the way Mr. Bernheim explained it, among the various European producers who were trying to regularize their exports in such a way that each one of them would have a certain quota, and he didn't know what his quota was going to be, and until he did know that, he couldn't tell us how much we could sell.

9125 Q. His idea was that you would have half of whatever he got as a result of his arrangements with the Europeans in South America and Japan?

A. That is right.

Q. Well, in connection with that suggestion, or that problem, did Mr. Pickard make any proposals as to how the French might solve that in order to determine what you would get in South America?

A. Yes, he did.

Q. What suggestion did he make?

A. He suggested to them that they form a joint selling company among the European producers with the idea that that company itself could determine where it would draw its supplies from the various manufacturers, presumably on a historical basis of how much they had sold in the past; to that extent they would be entitled to supply this joint selling company with the material.

Q. Well, what was Mr. Bernheim's reaction to that suggestion?

A. He thought quite well of it. He thought that something might be worked out.

Q. How did you leave the matter with him at that time?

A. Why, we left it that he was going to get in touch with the other European producers and see if he could arrange some of the details and then would let us know what the position was.

Q. Well, now, at a later date did you and Mr. Pickard
9126 have an opportunity further to discuss the matter with Mr. Bernheim?

A. Yes. Some two or three weeks later we were in Paris again and Mr. Bernheim called us on the telephone at our hotel and told us that he had arranged a meeting of the other producers and invited us to attend.

Q. This, as you recall it, was sometime when, about?

A. Oh, if the first meeting was around the end of January, I suppose this was perhaps the middle of February.

Q. Did you subsequently go over to Mr. Bernheim's office?

A. Yes, we did.

Q. Did you attend the meeting that he invited you to attend?

A. Yes.

Q. What companies were represented at the meeting?

A. Well, La Cellophane, SIDAC and KALLE.

Q. Who attended with you from Du Pont?

A. Mr. Pickard.

Q. How long did the meeting last that you attended?

A. It lasted the better part of the morning, I suppose from 10:00 to 12:30, or thereabouts.

Q. As you recall it, had they already been meeting or not?

A. Well, I wouldn't know, but I would assume not from the tone of the conversation.

Q. What was the nature of the discussions at the
9127 meeting?

A. Well, the Europeans talked a good deal about patents, about licensing each other on patents. Then they talked a good deal about reserve territories, where each one of them would have

the exclusive right to sell: France for the French, Belgium for the Belgians, Germany for the Germans, and so forth. They also mentioned the question of export to other world markets, and Mr. Bernheim explained the possibility of organizing a joint selling company which was to be located in Switzerland, and whose function would be to sell, or at any rate, to control the sales of the other Europeans to the various world markets.

Q. In what language were the discussions conducted?

A. Entirely in French.

Q. Did you or Mr. Pickard say anything at the meeting, or participate in the discussion in any way?

A. No, we did not. I felt a little like a dummy sitting there saying nothing, but after all the discussion was between Europeans and about European affairs primarily.

Q. What conclusions were reached as a result of the meeting at the time you left?

A. They concluded, insofar as the matter in which we were interested is concerned, that they would explore the matter seriously and actively and see if they could get into agreement on details as to how such a company would be set up and function.

9128 Q. Did you or Mr. Pickard at that time sign any agreement?

A. No.

Q. Did you make any commitment of any kind on behalf of Du Pont?

A. No, neither one of us was authorized to.

Q. Did you, whether you were authorized or not?

A. No, of course not.

Q. Was there any discussion at that meeting of United States markets, as you recall it?

A. I think there was some discussion. I think, as I recall it, that La Cellophane pointed out that they had licensed Du Pont and SIDAC, that they had licensed Sylvania and they had given them exclusive rights under their patents.

Q. I show you Government Exhibit 1414, in evidence in this case, and ask you when was the first time that you ever saw or heard of that document?

A. About three months ago.

Q. To your knowledge, was the controlling body and quotas mentioned in that document and discussed at the meeting you have described ever established?

A. I believe not.

Q. Was Du Pont ever a participant in any way in such a controlling body or in such quotas?

A. No, it was not.

Q. Immediately after the meeting did you have a
9129 discussion of the matter with Mr. Bernheim?

A. Yes.

Q. What was the nature of that discussion?

A. Mr. Bernheim explained again that he would have to see how the matter worked out in Europe, but he looked very favorably on the South American-Japan proposal, and Mr. Pickard told him that Mr. May would be arriving in Paris in two or three weeks to try and settle the details of that arrangement with him.

Q. Did you participate in the subsequent conferences which Mr. May had with Mr. Bernheim when he came over in May, I think it was, of 1930?

A. No, I did not.

Q. By the way, did you see Mr. May when he was over there?

A. Oh, yes, I saw him several times. I saw him in London, in Monte Carlo.

Q. Subsequent to his visit did you have any further discussions with Mr. Bernheim concerning the matter?

A. Yes, I had some discussions in July with Mr. Bernheim. The reason I remember the date is that I had received a cable from Wilmington inviting me to come home.

Q. Inviting you or ordering you to come home?

A. It makes no difference. They had said they wished to establish a new foreign relations department, and asked me to become its first director. I was making a trip around the
9130 continent to say goodbye to my friends and acquaintances there, and just before leaving on that trip I had had a cable from Mr. May asking me to put a proposal to Mr. Bernheim in connection with this Japan-South America scheme.

Q. Did you see Mr. Bernheim?

A. Yes, I did.

Q. What was the proposal?

A. The proposal was that rather than sharing both markets, we should take South America and the French would take Japan, or vice versa.

Q. Did you discuss that proposal with Mr. Bernheim, and what was said if you did?

A. Yes, we discussed it. He said, well maybe that's a good idea; I think you had better take Japan.

Q. How did you leave it with him?

A. We felt a little cautious when he said that, and said perhaps we had better look at South America also and we may have some further discussions about it. We did not make any commitments. We just put the proposal there and left it there.

9131 Q. You say "we". Was anybody else with you?

A. Yes; Mr. Ewing, who was my successor in London was with me.

Q. Then after that, I take it, according to your earlier testimony, you returned and became director of the Foreign Relations Department?

A. That's right.

Q. After becoming Director of the Foreign Relations Department, did you have an occasion to talk about these matters with Mr. Bernheim on any subsequent occasion?

A. Yes. I used to visit Europe almost every year and I would usually see Mr. Bernheim—not always, but usually—and I might just drop in to see him and ask him if there was any news, and the news usually was that they were having great difficulty with their Swiss company, hadn't been able to establish it yet.

Q. Did you ever, after that meeting in February 1930, that you attended with Mr. Pickard, ever attend any other meeting of a group, or two or more of the cellophane manufacturers in Europe?

A. No. I think I saw those gentlemen that were there for the first and last time on that date.

Q. Did anyone from Dupont, acting under your instructions, or to your knowledge, ever attend any further meetings

9132 with these European cellophane manufacturers?

A. You mean as a group?

Q. Yes.

A. No.

Q. Did anyone ever go and see each of them individually with respect to the subject matter of the meeting?

Q. Well, we had later a technical agreement with Kalle, and in the course of that there were visits made by our technicians and their technicians. But they were purely technical matters.

Q. Were there any discussions by anyone relating to the formation of this Swiss company, or the establishment of quotas?

A. No. It seemed to be quite dead.

Q. Did you ever, or did anyone in du Pont ever, to your knowledge, authorize La Cellophane to represent du Pont in such meetings for the purpose of discussing quotas and regularization of the business?

A. No.

Q. Did you ever receive formal minutes of meetings of the group?

A. No.

Q. Did du Pont ever join, to your knowledge, a European cartel, or, as Mr. May calls it in one of his letters, a fancy European consortium, or anything of that kind?

9133 A. On cellophane?

Q. Yes.

A. No.

Q. If du Pont had joined such an organization, would you have known about it?

A. Yes, I'm sure I should.

Q. Will you tell us how you would have known about it?

A. Well, the function of my department was to see in advance any proposed agreements with any foreign company, aside from pure purchase and sale, in order that we might be sure that those agreements didn't conflict with any other agreements that some other department might have. That was really the purpose of setting up the department originally.

Q. Did you ever hear or learn that a cartel was in fact established among these European producers without du Pont participating?

A. I understood it was not.

Q. Did you ever hear of any agreement or understanding among European producers which would have prevented Wolff, or Sidac, or other producers from selling into the United States?

A. No, I did not.

Q. Now, coming to the period that you are back here in the United States——

The COURT. Are you leaving this meeting some time
9134 in the early part of 1930 and going to another subject? If so, I want to ask a question.

Mr. GESELL. Certainly, your Honor.

The COURT. Why was so much consideration given to Sidac, the people who had purloined the secrets from La Cellophane?

The WITNESS. I understood, your Honor, that the French were content to let bygones be bygones in consideration of the stock which they had received and were willing to negotiate or work out a modus vivendi with them.

By Mr. GESELL:

Q. Now we are back in the United States at the time you were director of the Foreign Relations Department. I want you to tell us a bit more than you have so far about the function and activities of the Foreign Relations Department. To what extent, in setting up and organizing and running that department, were you required to keep in touch with du Pont's exports and export policy?

A. Well, that was one of the functions. The du Pont Company carries out its export business entirely under the control of each individual department. There is no central export department,

and the only place that our Executive Committee can get news about the export picture as a whole is through the Foreign
9135 Relations Department. We collect and analyze the export data and report that to the committee, showing it by areas and trends and that sort of thing, and then we render a specific service to the export managers in the way of maintaining what we call a foreign trade development division. That division was created in 1929 largely for the purpose of surveying the Latin-American market. They had two offices: one from Wilmington, which covered Mexico and the countries south as far as Peru and Venezuela, and the other with headquarters in Argentina, which covered the southern part of South America.

Those men had been carefully trained in a general knowledge of all du Pont products, and their particular function was to visit our agents, give them technical assistance, if they needed it, determine whether the agents were doing a good job, and if not, to recommend a new agent to replace them, and to conduct extensive market surveys, particularly for the future potential of our products.

Q. You said that you were also an operating department. To what extent did you, as an operating department, become involved directly in export matters?

A. We had some subsidiaries in South America eventually, one in Argentina, one in Brazil, both of which were manufacturing companies but were also selling companies, and we used them as our agents in those countries.

9136 Q. Were they sales agents for cellophane?

A. Yes, they were.

Q. To what extent did you also have contact directly with the export managers in the various departments of the company?

A. Well, we received their monthly reports as to the sales they had made, and I personally held a quarterly conference with all the export managers to listen to their complaints, to assist them in swapping experiences with regard to particular markets and particular problems. So I knew them all well personally and knew their problems.

Q. To what extent were you required to be familiar with the various agreements and understandings and arrangements that the different industrial departments had made with respect to exports and foreign markets?

A. We didn't actually visa every agent's agreement—I mean the appointment of an agent. We kept a list of them but we left that to the export manager to negotiate those commercial agency agreements. But in anything involving policy or rights, we were re-

quired to see the agreement before it was executed, and either approve it or voice our objection.

9137 Mr. GESELL. Will you mark this paper, Mr. Clerk, for identification, as DX 1001.

(Document headed, "SIDAC American Company Affiliation Participation by La Cellophane", was marked "Defendant's Exhibit No. 1001 for Identification".)

By Mr. GESELL:

Q. Mr. Swint, I show you a two-page document which has been marked in this case DX 1001 for Identification, which is headed, "SIDAC American Company Affiliation Participation by La Cellophane", and ask you whether this document contains the agreement which was negotiated by Mr. May with Mr. Bernheim in Europe and approved by the Board?

Mr. MINICUS. Before the witness answers, may I have a copy of the document, if your Honor please.

Mr. GESELL. I was just getting one ready to hand you. You already have one. I will give you another one (handing to Mr. Minicus).

Mr. MINICUS. Thank you, sir.

The WITNESS. Yes, this is the agreement.

By Mr. GESELL:

Q. What did you have to do with respect to the administration and operations of that agreement?

A. Oh, very little, except to see in the first instance that it didn't conflict with any other agreement. That was

9138 an agreement with one department of the company in a foreign country, and they administered the agreement themselves.

Q. Subsequent to your coming back and being Director of the Foreign Relations Department, Mr. Swint, did you have occasion to visit South America?

A. Several times.

Q. How frequently did you visit South America?

A. Why, about every two years. I went in 1931. I have been there just about every two years since then.

Q. For what purpose did you make this visit to South America?

A. Well, we had a lot of interests down there. They reported to me. I wanted to see how the boys were behaving and see how the business was going. And there were always problems in administering a business in a foreign country, and some of them are much better settled by personal conference than by correspondence.

Q. Do you recall making a trip to South America in company with Mr. Sterling Thompson?

A. Yes. He met me in Lima, and we went from there to Buenos Aires together.

Q. Who was Mr. Thompson?

A. Mr. Thompson was an employee of the Cellophane Division who was in charge of the supervision of their sales of cellophane in South America.

9139 Q. When did you make that trip with him?

A. Well, I am not just sure. I think it was about 1935.

Q. Did you on that trip have anything to do with cellophane?

A. Yes. I visited with him, at his insistence, although I was very glad to do so, numerous customers and agents and users of cellophane.

Q. And in what countries did you visit these people?

A. In Peru, Chile, Argentina and Brazil.

Q. As a result of that trip and the other trips you made to South America, did you gain some familiarity with the merchandising and sale of cellophane in South America?

A. Yes, I had some familiarity with it.

Q. What companies were selling cellophane in South America during the thirties?

A. Pretty nearly all of them, the Japanese, the French, Italians, British, and I think the Germans.

Q. Was SIDAC selling?

A. I believe so.

Q. Was du Pont selling cellophane at the same price as La Cellophane was selling it in the South American markets?

A. No. The price position was pretty chaotic. There was a lot of price cutting going on. We maintained a one-price policy, and we sold at the domestic price plus the extra charges for export.

9140 Q. Was that price the same as the French price?

A. No, not at all. The French didn't have the same price in two different markets.

Q. Were the sales of du Pont cellophane in South America during this period governed by any quota agreement or limited in any way by any quota agreement?

A. No, they were not.

Q. Were there, in fact, to your knowledge, any quotas in existence?

A. No, not at all—quite the reverse.

Q. Now, how long did these conditions that you have described persist in South America?

The COURT. What conditions?

Mr. GESELL. Conditions of price-cutting and competition with the other——

The WITNESS. Right up to the outbreak of the World War. When that came along, the Europeans were not in a position to ship. So that left the market pretty much to the American producers.

By Mr. GESELL:

Q. Well, what happened after the war?

A. Well, as soon as the war was over, they all got back in again and that is the situation today, and now there are also cellophane producers in at least two of the countries and probably another one coming in.

9141 Q. At any time, Mr. Swint, to your knowledge did du Point and La Cellophane sell in the South American market in accordance with an established quota or agreement to divide business?

A. No.

Q. Was there ever any limitation recognized by du Pont upon the amount of the business it could have in South America if it was able to sell it?

A. Not after it actually started to sell—only during these discussions that I spoke of.

Q. At the time of World War II, do you recall that the agreements with La Cellophane were cancelled?

A. Yes.

Q. When were they cancelled, as you recall?

A. I think it was shortly after the Germans invaded France.

Q. Was there any understanding to your knowledge at that time with La Cellophane or KALLE that these agreements would be revived or continued at some future time?

A. No.

Q. Have they in fact ever been revived?

A. No, they have not.

Q. Mr. Swint, the Government charges that the cancellations of the agreements at the time of the German invasion were mere shams and that du Pont continued to con-

9142 duct itself in accordance with the agreements and abide by the territorial arrangements that were in the agreements. What have you got to say about that?

A. Why that is quite untrue. We are selling cellophane and have been ever since that cancellation anywhere we could sell it. As long as we had the material to provide, we will take an order anywhere in the world.

Q. Do you know of any agreement in existence today which in any way prevents or limits du Pont in its exports of cellophane to any part of the world?

A. No, I do not know of any such.

Q. Do you know of any agreement or arrangement, to which du Pont is a party, which prevents any foreign manufacturer from selling into the United States?

A. No, there is no such agreement.

Q. Now, coming to C. I. L., you are a director of C. I. L., are you not?

A. Yes.

Q. In that sense director means a member of the Board, a director?

A. That is right.

Q. How long have you been a director?

A. Oh, I think ten or eleven years.

Q. What is C. I. L.?

A. Why, it is a Canadian corporation which manufac-
9143 tures and sells a rather wide variety of chemical and allied products.

Q. When was it organized?

A. 1910, I think.

Q. Who organized it?

A. du Pont and the Nobel Company of England.

Q. Nobel is now known by the name of I. C. I., is it not?

A. Yes.

Q. Imperial Chemical Industry?

A. That is right.

Q. What was the purpose for which C. I. L. was organized?

A. Organized to manufacture explosives in Canada.

Q. How much C. I. L. stock does du Pont own, voting stock?

A. It owns, I think, three million shares, which is about 42 per cent.

Q. And how much does I. C. I. own?

A. Almost exactly the same. They own a few more shares.

Q. How many members of the Board of Directors are there of that company?

A. Fifteen.

Q. How many of those are employees or representatives of the du Pont Company?

A. Four.

Q. How many are employees or representatives of I. C. I.?
9144 A. Four.

Q. In 1931 about what was the size of C. I. L. in terms of its assets or gross sales?

A. Well, as I recall it, its sales then were about 18 million dollars a year.

Q. What are they today?

A. Last year they were 137 million.

Q. What are some of the products that C. I. L. sells?

A. Well, they sell explosives, ammunition, alkali, a general line of chemicals, fertilizers, nylon, cellophane, paints, artificial leather, and possible some others that I can't recall.

The COURT. Incidentally, Mr. Gesell—and it perhaps may have no relevance here—what does the Government ask in its decree as against I. C. I. in the New York proceedings? What is to happen to I. C. I.?

Mr. GESELL. As to C. I. L.?

The COURT. No, I. C. I.

Mr. GESELL. They have asked for a termination of all contractual arrangements between du Pont and I. C. I., most of which already long since were cancelled.

The COURT. The decree doesn't reach out and touch C. I. L.?

Mr. GESELL. It does, your Honor.

The COURT. In what fashion?

9145 Mr. GESELL. The Government asks that the joint interests of du Pont and I. C. I. in C. I. L., as well as in other companies which were formed by those two concerns in various parts of the world, be eliminated.

The COURT. That might have a direct effect on this proceeding.

Mr. GESELL. It might very well. We have been litigating in that case the contention that we had a different conspiracy as to cellophane involving different people in different markets. We have to litigate them wherever we are, your Honor, on the theory the Government thinks is best at the particular moment.

But that may very well affect the organization, operation, and character of C. I. L. very substantially, depending upon what action the Court takes on the proposed judgments. And there has been no action taken by the Court as yet.

The COURT. Will you keep me advised on that matter?

Mr. GESELL. I will. I will furnish the Court with a decree if and when we ever get one.

By Mr. GESELL:

Q. To what extent is C. I. L. a manufacturing company, Mr. Swint?

A. Oh, primarily. It does purchase from du Pont and I. C. I. and many other people various products which it resells in order to round out its line, have a complete line to

9146 offer a customer.

Q. When did C. I. L. first manufacture cellophane?

A. 1932, I think.

Q. To what extent did du Pont assist C. I. L. in getting started in the manufacture of cellophane?

A. Well, it was entirely responsible for it. It furnished the designs and helped in the construction and trained the operatives

and furnished complete technical information from the inception of the plant up to yesterday.

Q. By the way, Mr. Swint, does I. C. I. make cellophane?

A. No, they do not.

Q. To what extent did du Pont grant licenses to C. I. L. under its Canadian patents?

A. It licensed them under all of its Canadian cellophane patents.

Q. Why did du Pont decide to license C. I. L. and set it up in the cellophane business?

A. Well, the C. I. L. people felt that the time had come when they could justify a plant and they made their sales survey and their construction estimates, cost estimates, and decided that they could show a reasonable return on the investment, presented the project to the Board of Directors, who authorized it.

Mr. GESELL. Mr. Clerk, will you mark this DX 1002 for identification.

9147 (Agreement between du Pont Cellophane Company and C. I. L., dated November 1, 1933 was marked "Defendant's Exhibit No. 1002 for Identification".)

By Mr. GESELL:

Q. I show you DX 1002, Mr. Swint, an agreement between du Pont Cellophane Company and C. I. L. as of the first day of November, 1933, and ask you whether or not that is the contract under which du Pont licensed and set C. I. L. up in the cellophane business?

Mr. MINICUS. May we have a copy of this, your Honor? It is the Defendant's document. We may have a copy—I don't know.

Mr. GESELL. These are just for identification. I am not offering it.

Mr. MINICUS. You are questioning the witness about it. I would like a copy.

The WITNESS. Yes, it is.

By Mr. GESELL:

Q. How long did that agreement remain in effect?

A. Until the Tripartite Agreement was made between I. C. I., du Pont and C. I. L. I think that was in 1936. I have forgotten the exact date.

Q. We have a copy of that in evidence, Mr. Swint. Briefly what was it?

A. The Tripartite Agreement?

9148 Q. Yes.

A. Well, it was an agreement under the terms of which both du Pont and I. C. I. agreed to offer licenses to C. I. L. on any product which C. I. L. wished to manufacture, or sell.

Q. Now, can you tell us whether at any time permission was granted by du Pont and I. C. I. to C. I. L. to permit C. I. L. to export cellophane?

A. At any time?—

Q. Yes.

A. Yes.

Q. When was that done?

A. Well, as I recall it, du Pont gave such permission unilaterally at one time, I think it was about 1940, but in contravention of the Tripartite Agreement which expected C. I. L. to stay within Canada in its sales; in view of the fact that the major shareholders had furnished all the capital, or substantially all the capital, and all the technique, it didn't expect to have them selling outside of Canada.

But in 1945, I think it was, right after the war, I attended a meeting in London at which representatives of I. C. I. and C. I. L. were present, and C. I. L. made very strong representations to us that they were under considerable pressure from the Canadian Government to export in view of the need of Canada for American dollars, and we decided that the time had come when C. I. L.
9149 was grown up and they could stand on their own feet, and we gave them that—abolished all restrictions on exports of any products.

Q. That was about 1945, was it?

A. '45, as I recall it.

Q. Did du Pont ever fix C. I. L.'s cellophane prices?

A. No.

Q. At the present time does du Pont have any patents or agreements with C. I. L. that prevent it from selling in the United States?

A. No.

Mr. GESELL. Your witness.

Cross-examination by Mr. MINICUS:

Q. Mr. Swint——

A. How do you do.

Q. Are you able to carry on a conversation in French?

A. Not too fluently. I understand it fairly well.

Q. You understand a conversation when it is being carried on before you fairly well?

A. Fairly well, if I am acquainted with the subject matter particularly.

Q. Now, did you testify that during your tenure in Europe and in trips after you had left Europe and returned for visits that you visited agents of the du Pont Company in Europe?

9150 A. No, I didn't testify that way.

Q. What was your testimony as to agents of the du Pont Company in that part of the world?

A. I don't think the word "agents" was used with relation to Europe.

Q. Did you have any agents selling cellophane in Europe?

A. No, not at that time.

Q. Have you no recollection, Mr. Swint, of any period in which du Pont was attempting to follow the prices which the French were selling cellophane at in South America?

A. No, I certainly have not.

Q. You recall no correspondence, or no correspondence ever came to your attention as director of the Foreign Relations Department wherein officials of the Cellophane Company assured the French that they were making an effort to follow their prices?

A. No, I don't recall any such correspondence.

Q. Do you recall any correspondence from the French requesting du Pont to forward to the French information concerning the prices du Pont was charging in South America?

A. No. And, as a matter of fact, if there ever was such correspondence, I wouldn't normally see it anyhow.

Q. Then is it possible that there was an exchange of information between the French and the du Pont Cellophane Company

9151 concerning prices in South America that hadn't come to your attention?

A. I think that is extremely unlikely.

Q. But is it possible?

A. Well, I suppose it is possible. Anything is possible.

Q. Particularly if you hadn't seen the correspondence, the entire correspondence between both parties, isn't that true?

A. Isn't what true?

Q. That it would be possible for this to have happened without your knowledge?

A. I thought you said, isn't it possible particularly; I didn't catch the connotation there.

Q. You have testified that very probably you didn't see all of the correspondence passing back and forth?

A. Oh, I didn't see any correspondence to speak of with regard to purchases and sales. Those were routine matters that went on every day.

Q. Let's address ourselves to correspondence concerning price information. Is it possible that some of that passed without your knowledge?

A. I wouldn't expect to see it unless it were an agreement on prices.

Q. You mean by an agreement, do you not, sir, a formal agreement authorized by the Board of Directors and signed
9152 by officers of the Company?

A. Well, not necessarily. Some agreements don't have to be authorized by the Board of Directors, but any agreement affecting our relations with foreign companies which involved a matter of policy, I would see.

Q. Mr. Swint, I would like to hand you a copy of the document we have had under discussion this morning—this is a typewritten copy; the photostat is not too clear. It has been checked for identity.

Mr. MINICUS. This is Government Exhibit No. 1414, your Honor, that I believe you have before you.

The COURT. Yes, sir.

By Mr. MINICUS:

Q. Now, Mr. Swint, does this document purport to be an official report of certain meetings held in Europe on the 11th and 12th of February, 1930?

A. Does it purport to be that, you say?

Q. That is correct, sir; does it say that it is?

A. Well, it says so, yes. That is what the document says.

Q. Does that report list your name as among those present?

A. Yes, it does.

Q. Were you there as a representative of the du Pont Company?

9153 A. Yes.

Q. Were any other persons there representing du Pont, and if so, please identify what person or persons?

A. Mr. Pickard was there, the vice president of du Pont.

Q. What other producers of cellophane were representing their companies there? What companies were represented there?

A. I think I testified to that.

Q. Would you testify to it again, sir, please.

A. La Cellophane, SIDAC and KALLE.

Q. Now, if you will address your attention, Mr. Swint, to the early part of the first paragraph, does the exhibit state in effect that an agreement could be entered into by and between the different producers of cellophane there present and M. Wolff if he agrees after KALLE and Company have explained to him the present negotiations?

A. Yes, it says that.

Q. You presented a background for this meeting in terms of certain alleged difficulties between La Cellophane and SIDAC. What is M. Wolff doing in here? Perhaps you will explain that

first. Why is this reference to Wolff and Company, the German producer of cellophane?

A. I don't know just how you want me to answer that question, whether I know all about it or something I heard.

Q. Well, you have, sir, attempted to justify SIDAC's
9154 presence at this meeting——

A. They told me that.

Q. By virtue of the difficulty?

A. That was explained to me.

Q. Why are certain things here contingent upon M. Wolff agreeing?

A. Well, I believe—I have been told from time to time—I never met Mr. Wolff or any of his company; but I have been told from time to time by other people in Europe that Wolff, although controlled from a financial aspect by either Kalle, or some other member of the I. G., had some sort of a family contract under the terms of which he was completely free to run the business in any way he pleased. So although the German representative was present representing a company, if we call it the I. G., which owned I don't know just how much, two-thirds or more of Wolff's stock, nevertheless he was not free to commit Wolff to any agreement. And that is, I presume the reference to the phrase "if he agrees".

Q. Why was it necessary to commit Wolff to any agreement, Mr. Swint?

A. These were European cellophane manufacturers. At that time, as far as I know, they were practically all the European cellophane manufacturers.

Q. But then whether or not Wolff ever agreed to this matter that was under consideration here would have no effect
9155 upon du Pont's operations at all, would it?

A. No, none at all, except in this respect: Don't forget, these are European manufacturers accustomed to dealing by organizing consortiums in which they each get a share of the business. Now, if Mr. Wolff didn't agree to go into that consortium, the share of the business which La Cellophane would get would be diminished by the amount of the sales that Wolff made.

Q. But Wolff never was accused of purloining anybody's secret processes?

A. Oh, no, not so far as I know.

Q. And he had been operating for a considerable number of years in the manufacture of cellophane in Germany at this time?

A. I think so. I don't know just how long he had been operating.

Q. Did Wolff and the SIDAC and La Cellophane represent the three largest manufacturers of cellophane in Europe at this time?

A. Well, I don't remember the exact proportions that each of them made, and there were some other producers, too, but I think it is a fair statement to say that the three of them had the majority of the production.

Q. Can you identify any of the other producers who were operating in Europe at that time, sir, 1930?

9156 A. I think there was a little outfit in England called the Transparent Paper Company, and there was, of course, an Italian company.

Q. What was the name of that, sir?

A. I just don't remember.

Q. Wasn't that the Italian SIDAC?

A. I don't know whether Italian SIDAC was operating then or not. They may have been.

Q. SIDAC, like La Cellophane, Mr. Swint, had several so-called licensees, did they not?

A. Yes.

Q. Sylvania was a SIDAC associate?

A. That is right.

Q. There was a British SIDAC, was there not, sir?

A. At that time I don't believe there was. I am not sure on that.

Q. One came into being later on perhaps?

A. There may have. There was a British Cellophane Company. I don't remember British SIDAC.

Q. And there was an Italian SIDAC?

A. I think so.

9157 Q. Does this document, Mr. Swint, recite an understanding that the French market would be reserved to La Cellophane?

A. Yes.

Mr. GESELL. I object to that, your Honor. He said understanding. By whom?

The COURT. Objection sustained.

Mr. MINICUS. I submit, your Honor, that I am just using the language of the document.

The COURT. Well, you just can't start a sentence and stop halfway. If you have an understanding, it must be between A and B or X and Y. It's got to be between two people in the sense you are using it.

Mr. MINICUS. Let me rephrase the question.

By Mr MINICUS:

Q. The first sentence of this document, Mr. Swint, says, does it not, that Monsieur Gillet explained that an agreement could be entered into by and between the different producers of cellophane present at this meeting, and Mr. Wolff?

A. Is that a question?

Q. I said does the beginning of the first sentence state that?

A. Yes. You are reading it verbatim.

Q. And you have told me that the producers there
9158 present were Sidac, duPont, Kalle and La Cellophane?

A. I don't think I said that.

Q. Who was represented at this meeting, Mr. Swint?

A. You asked me who the other producers were, and I told you.

Q. What were the producers of cellophane who had representatives present at this meeting?

A. Sidac, La Cellophane, Kalle, Mr. Pickard and I were there, not as taking part in the meeting; we were there as guests of Mr. Bernheim.

Q. Were you there as representatives of the du Pont Company?

A. Well, we couldn't be there in any other capacity. We took no part in the discussions, and agreed to nothing.

The COURT. While we are on this document, will either Mr. Gesell or Mr. Minicus refresh my recollection of these names which came before me for the first time many months ago?

Who is Van Ham?

Mr. MINICUS. He was an official of the Sidac; so was Mr. Vlourink.

The COURT. Mr. Lissmann?

Mr. MINICUS. I believe he was Kalle. I couldn't be sure. Mr. Todt I know was Kalle. Brandenberger, Gillet and Bern-
9159 heim I know to be La Cellophane. The last name I am not familiar with.

The COURT. Can you tell me, Mr. Gesell?

Mr. GESELL. It is my understanding, as I advised the Court a long time ago, that Mr. Maucomble was connected with La Cellophane.

The COURT. Very well. Proceed, gentlemen.

By Mr. MINICUS:

Q. Continuing, Mr. Swint, with this first paragraph, does it not say: It being understood that the French market would be reserved to the French company, La Cellophane?

A. Yes, it says that.

Q. The German market to Kalle and Company and M. Wolff?

A. Yes, it says that.

Q. The Belgian and Dutch markets to the Sidac?

A. Yes, it says that.

Q. The Italian market to the Italian Sidac company?

A. Yes, it says that.

Q. And North America to the du Pont de Nemours and Sylvania, formed by the Sidac?

A. Yes, it says that.

Q. Of the producers of cellophane present at that meeting, with which did du Pont have an agreement on the exchange of technological information?

A. La Cellophane.

9160 Q. Is that the only one?

A. At that time I think it was. We later had a technical agreement with Kalle.

Q. Isn't the date of the Kalle agreement 1929?

A. I don't recall. It may be.

Q. And du Pont did not have any agreement for the exchange of technological information with the Sidac?

A. No.

Q. Nor did it have any agreement with Wolff?

A. No.

Q. So all the subject matter of this conference in Europe at this time is outside the framework of these agreements that originated with La Cellophane, is that correct?

Mr. GESELL. I object to that. I don't think it is clear what he is talking about. Do you mean the license agreements, the Pont-La Cellophane license agreements? If he means that, it is clear.

Mr. MINICUS. I did not characterize them as license agreements. There were certain agreements entered into between du Pont and La Cellophane in 1923.

Mr. GESELL. I object to the question as being vague and indefinite.

The COURT. What kind of agreements?

Mr. MINICUS. Commercial agreements between du Pont and La Cellophane in 1923.

9161 The WITNESS. There were no such things.

By Mr. MINICUS:

Q. Did you have an agreement with La Cellophane dated June 1923?

A. I believe so, yes.

Q. Did you have another agreement with La Cellophane dated December 1923?

A. I couldn't be sure of those dates.

Q. Did you have an agreement with Kalle dated in or about 1929?

A. I believe we did.

Q. Did you have an agreement with Wolff at all?

A. No.

Q. Did you have an agreement with Sidac?

A. No.

Q. Now, inasmuch as members of the Sidac were present at this conference, and Wolff was to be informed of it, the subject matter must have been a subject matter outside the scope of the agreements we have just discussed, is that correct?

A. Oh, it could be. Obviously, this is a matter of commercial sales primarily. There was a lot of argument back and forth among the Europeans about patents.

Q. Returning now to Government Exhibit 1414, did the terms of this memorandum, which is the official report of
9162 the meetings, anticipate creation of a controlling body supervising prices and prescribing quotas for production for certain non-reserve countries?

A. Yes.

Q. At the bottom of page 1 you will find that language.

A. I thought it was on page 3. That's right, it does.

Q. If you will kindly direct your attention to the bottom of page 3, and continuing over to page 4, does the exhibit make special provision for exports by the European producers to all countries of North America down to the Panama Canal?

A. I thought it said excepting those.

Q. Would you care to read it?

A. Fiduciary company shall fix——

Mr. GESELL. Surely he doesn't mean he has to read it out loud, does he, your Honor?

A. (Continuing.) Well, this simply says that this fiduciary company is going to establish the quantity of material sold by these various companies and invoiced during the year 1929 for export outside the reserve countries, which were France, Germany, Belgium and Holland, and excepting the export made by each of the companies to the North American continent. That is the end of the sentence.

Q. Are you through?

A. Excepting the exports made by each of the companies
9163 to North America.

Q. Now, turning back to page 1, doesn't that page 1 point out that there is a reservation of North America to the du Pont Company and Sylvania formed by the Sidac?

A. As licensees of the La Cellophane and the Belgian Sidac.

Q. Now, you haven't answered by question yet. Does the document state that?

A. Well, the document states that. We didn't have anything to do with it. We didn't agree to any of that. That is just their statement of what they were prepared to do among themselves.

Q. Does the document make any statement that this reservation of North America is by virtue of the Company's being——

A. No, it doesn't say that.

Q. Is there any recital anywhere in this document, Mr. Swint, that La Cellophane would share in the Sidac stock?

A. No. That had already been arranged, I believe

Q. Are you sure?

A. Well, Mr. Bernheim had told me they had reached agreement.

The COURT. I notice that there is no signatory of the du Pont Company on GX 1414. Were you ever asked to sign this document?

9164 The WITNESS. No, we were never asked to sign it. I never saw the thing until about three months ago.

By Mr. MINICUS:

Q. As far as the du Pont Company is concerned, this memorandum of the meetings of February 11th and 12th was a dead issue after this date?

A. I don't know that I understand what you mean by that. That the document was a dead issue? We hadn't seen the document.

Q. You hadn't seen the document?

A. We hadn't seen the document.

Q. Then you, or no other member of the du Pont Company could ever rely upon anything that was ever stated in this document?

A. I can't speak for everybody in the du Pont Company but this document was evidently a condensation of conversations that took place over two days. We were present on one day. I don't know what they said the other day.

Q. Do you know how the document might have got in the du Pont Company files?

A. I can surmise about it. I don't know how it got here.

Q. But you never relied upon anything said in this document after this date?

A. I certainly did not. I didn't know it existed.

Q. You don't know whether any other officials of the
9165 du Pont Company ever relied upon the terms of this document after this date?

A. No, I don't know that. How could I know it?

Q. Mr. Swint, I show you a copy of Government Exhibit 1013, which is a letter signed by Mr. B. N. May and is addressed to La Cellophane, Paris, attention of Messrs. Gillet and Bernheim. Do you recognize Mr. May's signature there?

A. It is a little faint, but I guess that is his signature.

Q. Whose signature is that over there?

A. That looks like Mr. Bernheim's signature.

Q. So this is a letter signed by both Mr. May and Mr. Bernheim, is that correct?

A. Yes, it is.

Mr. MINICUS. If your Honor would care to have a copy of this document before you, you may have this. This is GX 1013.

The COURT. I have it right here.

Q. Now, Mr. Swint, does this letter bear a date less than a month subsequent to Government Exhibit 1414, which we have just discussed?

A. Yes, it does.

Q. What is the date of this letter?

9166 A. March 6, 1930.

Q. Had Mr. May joined Mr. Pickard and yourself in Europe between the meetings of the 11th and 12th of February and March 6, 1930?

A. He joined Mr. Pickard.

Q. You had left by that time?

A. No, I hadn't left Europe by that time. I don't know where I was: in England or Germany or Italy somewhere.

Q. Now, will you kindly observe the opening paragraph of this letter and tell me, does it purport to be du Pont's understanding of an arrangement agreed to on March 6th between the representatives of La Cellophane and du Pont?

A. It purports to be an agreement reached between four individuals, and winds up by saying it is subject to the ratification of the board.

Q. Now, two of those individuals are Messrs. Gillet and Bernheim. Is it correct they represent the French, the La Cellophane?

A. Oh, yes.

Q. And two others are Messrs. Pickard and May, and is it correct that they represent du Pont?

A. Well, I don't know exactly what you mean by represent. They were employees of theirs. They were present as employees and as officials, but they didn't have any power to commit the company.

9167 Q. Were they over there on a social visit with Mr. Gillet?

A. No, they were over there to discuss this question.

Q. As whose representatives?

A. As representatives of du Pont.

Q. You will notice that this document is in the form of numbered paragraphs. Will you direct your attention to numbered paragraph 1? Does that recite that du Pont had been confined to the markets of North America but that its territory was now to be extended to other countries according to a certain percentage?

A. You will have to give me a little time on this. This is a very bad copy and I don't see too well.

Q. I have a typewritten copy here that may be more helpful. It is not too good but it might be better. The other one I have notes on and I wouldn't want you to be confused by it.

A. All right. Yes, that's about what it says.

Q. Does numbered paragraph 2 state as follows: In the event Wolff comes within the accord of the agreement outlined in your memorandum of February 11th and 12th, all of the companies are to enjoy their own territory free from the competition of others. The remainder of the world to be divided according to the quotas of past experience, endeavoring to stabilize prices therein,
9168 of that portion of this so-called Wolff territory, which is to be determined for La Cellophane in South America, China and Japan, 50 per cent thereof to be allotted to du Pont Cellophane Company, which shall sell at prices similar to the others in the group. Details as to agents, methods of distribution, etc. to be worked out to our mutual satisfaction.

Is that a correct statement of that paragraph?

A. You read it correctly, except you said agreement instead of arrangement.

Q. This is a letter originating in the du Pont Company from Mr. May?

A. That's right.

Q. And there he expressly has reliance, through a reference, to the memorandum of February 11th and 12th?

A. What is that?

Q. In this paragraph, Mr. May expressly makes reference to the memorandum of February 11th and 12th?

A. That's right.

Q. And he further states there that in the event of certain conditions, expressed in the memorandum of February 11th and 12th, the extent of du Pont's markets will be affected?

A. That's right.

Q. Does numbered paragraph 3 read as follows: In the
9169 event Wolff does not join in the accord, and as a consequence Kalle and Company do not relinquish China to the world territory, then du Pont Company shall be entitled to a volume of business in South America and Japan equal to that of La Cellophane?

A. That's what it says.

Q. And here again, upon the contingency of Wolff joining the accord in Europe, the markets for the du Pont Company will expand or contract or remain in status quo, is that right?

A. That's right.

Q. Does numbered paragraph 5 state as follows:

It is further understood that in the event of any happening that may result in the elimination of any of the existing companies, except La Cellophane, du Pont Cellophane Company is to receive always a quota equal to that of La Cellophane in those countries to which du Pont is now to be admitted.

A. That's right.

Q. Why, Mr. Swint, should the elimination of SIDAC, or Wolff, from an accord in Europe influence the markets or the degree of participation in those markets which du Pont should be able to enjoy?

A. The sales of duPont were to be dependent on what La Cellophane was free to sell. If La Cellophane's market was expanded or contracted, depending upon whether within the consortium—depending upon whether Wolff came in or out—the sales were affected accordingly.

9170 Q. Turning to paragraph numbered 7, does that read:

In regard to moisture-proof cellophane, du Pont Cellophane Company is entitled to a quota equivalent to that of the cellophane in South America and Japan, and also in China, in the event concessions are obtained from Kalle and Company for the last named country. It is understood that moisture-proof cellophane material shall always be sold at an advance in price over the regular cellophane.

Is that a correct statement?

A. Yes, you read it correctly.

Q. Maybe you can explain to me, Mr. Swint, exactly why was du Pont in all of these paragraphs tied to a quota of La Cellophane's shares as determined by the cartel?

A. What's that? I didn't get the question.

Q. Why was the quantity of the sales which du Pont was to be allowed in these various markets always tied to a quota dependent upon the share La Cellophane received?

A. That was the deal La Cellophane offered us.

Q. Then your arrangements with La Cellophane were dependent upon what Wolff and SIDAC did in Europe?

A. To some extent. That was the theory of it, but that wasn't the practice.

Q. Along that line, Mr. Swint, could you tell us how La Cellophane's consent could possibly affect du Pont's right to sell cellophane in China?

A. You are asking me to speculate about things that I
9171 had nothing to do with. If it will be of any help to you, I will try and speculate, but it doesn't have any standing. I didn't have anything to do with this.

Q. Was the du Pont Company able to sell cellophane in China at this time?

A. Not in accordance with the original proposal, they were not.

Q. What kept them out of China?

A. The proposed agreement that La Cellophane offered us.

Q. Based on patents?

A. Oh, I don't think this was particularly tied to patents at this stage.

Q. What was it tied to?

A. Well, it was tied to a proposal that La Cellophane made. They said you have been hurt; now we offer you this in exchange. We had no license. I don't know whether they had any patents or not in China. They may have had. But at any rate, we had licenses only for the North American continent and they were prepared to give us a license to that extent.

Q. What kind of licenses?

A. License under any patents that they had, for one thing, and license under the technology which they had contributed to us.

Q. What kept you out of China? The Chinese patent laws?

A. I never examined the Chinese patent laws.

9172 Q. Do you know whether there are any Chinese patent laws?

A. There have been at times.

Q. Were there at this time?

A. I don't know.

Q. Or was it the Chinese secret process laws, Mr. Swint?

A. Is that a question?

Q. Yes.

A. I wouldn't know.

The COURT. I think we will take our mid-morning recess at this point.

(At this point a brief recess was taken.)

9173 By Mr. MINICUS:

Q. Now, Mr. Swint, if you will just turn to the final numbered paragraph of this document, Government Exhibit 1013, which is paragraph number 8. Does it read as follows: "It is our mutual understanding and desire that there shall be close cooperation between your group and du Pont Cellophane Company in matters of price control and general sales information and development in the specified territories."?

A. That is what it says.

Q. Now, Mr. Swint, don't we find in that paragraph the answer to all of the questions that we had from the preceding paragraphs, that La Cellophane was the alter ego in this thing of du Pont,

that is, in this, as Mr. Gesell has termed it, fancy European consortium, La Cellophane was representing du Pont and that was so because du Pont was aware of the unlawful nature of the cartel?

Mr. GESELL. Objection, your Honor, argumentative, prolix——

The COURT. I don't think so. Objection overruled.

The WITNESS. That was a rather long question.

(The Reporter then read the last question.)

The COURT. Now, wait a minute. That is really five questions. Break up that sentence.

Mr. MINICUS. Yes, sir.

By Mr. MINICUS:

Q. Is it true, Mr. Swint, that under the laws of the
9174 United States du Pont considered this accord that was then being formed in Europe to be unlawful?

A. I believe, from what I have been told, that had such an accord been made in the United States, it would be unlawful.

Q. And if du Pont operated within the United States in accordance with the accord, do you not think it would have been unlawful?

A. I have heard an awful lot of arguments about that. I can't pretend to know the law on it.

Q. Now, doesn't this paragraph say that there shall be close cooperation between your group and the du Pont Cellophane Company in matters of price, etcetera?

A. By "your group" you mean La Cellophane?

Q. Yes.

A. Yes, it says that; it says between those two, between du Pont and La Cellophane.

Q. And isn't that exactly what happened? Didn't La Cellophane represent the du Pont Company in this group?

A. No, it did not.

Q. You mentioned, sir, that about 1938 the du Pont-C. I. L. relationships in cellophane came within the terms of the Tripartite Agreement?

A. A few years earlier than that.

Q. Is that the same Tripartite Agreement that was
9175 recently litigated in the Southern District of New York?

A. It was introduced as an exhibit there.

Q. Now, Mr. Gesell stated that in that proceeding the du Pont Company had to face charges that it had conspired in the field of cellophane with persons other than those we are dealing with here. Who were those persons?

A. I don't recall that charge.

Mr. MINICUS. No further questions, your Honor.

Redirect examination by Mr. GESELL.

Q. Mr. Swint, you were questioned at length about Government's Exhibit No. 1013; do you recall?

A. Yes.

Q. Now I show you DX 1001 for Identification, and I show you Government's Exhibit 1013. Which of those was the agreement that was in operation between du Pont and La Cellophane as a result of Mr. May's negotiations?

A. DX 1001.

The COURT. May I see it, Mr. Swint?

The WITNESS. Yes [handing to Court].

Mr. GESELL. DX 1001, if your Honor please, is the signed copy of Government Exhibit 1015.

The COURT. 1013, you mean.

Mr. GESELL. 1015, already in evidence.

9176 Now, if I may interrupt the examination a minute, I think I can show your Honor the sequence.

Government Exhibit 1013, which was the subject of the cross-examination at such length, was presented to a Board meeting of the du Pont Cellophane Company, which is covered by Government Exhibit 1015. It was not ratified by the Board but it was changed, and Government Exhibit 1015 was sent to the French in Government Exhibit 1014 as signed by du Pont and came back from the French signed and subscribed to by them in Government Exhibit 1016, and the only purpose for which I have had marked and now offer Defendant's Exhibit 1001 is to offer to the Court the full signed and notarized copy of the exhibit which is already in evidence as Government Exhibit 1015.

The COURT. I have it.

Mr. GESELL. And I now offer Defendant's Exhibit for identification 1001, identified by Mr. Swint as an exhibit, to bear that number.

(The document entitled "SIDAC American Company Affiliation—Participation by La Cellophane", previously marked "Defendant's Exhibit No. 1001 for Identification" was marked "Defendant's Exhibit No. 1001".)

The COURT. Well, is this a duplication? Did the Government put in what is your DX 1001?

Mr. GESELL. They put in the first page. My copy of it is

9177 the one signed by the French and notarized by the French and is the formal signed agreement. They put in only the first page. I thought we ought to have the whole thing.

Mr. MINICUS. I would like to have it clear, your Honor, that to the best of my knowledge the first page of this thing is all we ever received or had notice of. The second page anyway is merely a notary's attestation and seal.

Mr. GESELL. Not at all. It is the signature of the French to the contract, and of course the fact that the Government didn't know about it explains why they have been so long under this mistaken impression about quotas and prices in South America.

The COURT. In other words, I want to have this clear and then I want to pass it. As a result of these Paris conferences all the preliminary matter found in the earlier documents never came into fruition in the form of a legal document?

Mr. GESELL. That is right. And the controlling document is Defendant's Exhibit 1001, Government's Exhibit 1015.

Mr. MINICUS. I think Mr. Gesell's position at the present time is a little in conflict with your Honor's last statement. I think Mr. Gesell is contending that instead of the document that I cross-examined the witness on, this is the one that came into full fruition as an agreement between the parties.

9178 The COURT. I have the point.

Mr. GESELL. The one ratified by the Board and signed by Mr. Brandenburg.

I also offer in evidence Defendant's Exhibit 1002, the C. I. L. contract identified by Mr. Swint.

(Agreement between du Pont Cellophane Company and C. I. L., dated November 1, 1933 was received in evidence and marked "Defendant's Exhibit No. 1002".)

Mr. GESELL. Your Honor, if I may, for the moment, on these miscellaneous exhibits that come in, it is our intention to duplicate them and put them in bound volumes, and all parties will have them. It hasn't been possible always to duplicate them in advance, but I think that will be of convenience to everyone.

No further questions.

Recross-examination by Mr. MINICUS.

Q. Do you have a copy of Defendant's Exhibit 1001 before you, Mr. Swint?

A. I haven't anything before me.

Mr. MINICUS. Do you have a copy of that for the witness?

Mr. GESELL. I am going to hand him both Defendant's Exhibit 1001 and GX 1013. That is what you want him to get, isn't it?

9179 Mr. MINICUS. Yes.

By Mr. MINICUS:

Q. Will you address yourself, Mr. Swint, in Exhibit 1013 to numbered paragraph 5. That is the one that speaks of what shall happen in the event of the elmination of any of the existing companies, etcetera; and at the same time, after you have studied

that, address yourself to subparagraph (c) of Defendant's Exhibit 1001.

A. Yes.

Q. Are you able to point out any basic difference in those two paragraphs in the two exhibits?

A. Yes, I think there is a little difference there.

Q. Will you tell us what it is, sir.

A. Paragraph 5 in 1013 says that in certain events Du Pont Cellophane is to receive always a quota equal to that of La Cellophane. Subparagraph (c) says Du Pont Cellophane is to receive always rights equal to those of La Cellophane.

Q. And these rights equal to those of La Cellophane again depend upon any happening that may result in the elimination of any of the existing companies, is that correct?

A. Oh, yes, that is what it says.

Q. Then subparagraph (d) of DX 1001, does that not state that du Pont shall have equal rights with La Cellophane in South America and/or Japan on moistureproof cellophane?

9180 A. That is right.

Q. And (e), that du Pont shall have the option to participate upon the same terms and conditions as La Cellophane in any understanding to build plants in Japan and/or South America?

The COURT. "Undertaking" instead of "understanding."

Mr. MINICUS. Yes, that is right.

By Mr. MINICUS:

Q. Is that correct?

A. That is right.

Q. Now, the first paragraph of what Mr. Gesell claims is the official agreement, does it not say——

Mr. GESELL. What the evidence shows, if your Honor please.

By Mr. MINICUS:

Q. Does it not say that Mr. B. M. May orally reported upon his discussions with La Cellophane in Paris during March, 1930?

A. Yes, it says that.

Q. Then the fourth paragraph: "Proceeding upon the same basis, Mr. May stated to La Cellophane that he would submit to his Board of Directors the following proposition, made by La Cellophane subject to approval of its Board of Directors, namely—" and then follows the numbered paragraphs we have discussed.

9181 A. Yes.

Q. Now, will you turn to 1013. Does that bear Mr. May's signature?

A. Yes, it does.

Q. And is it also signed by Mr. Bernheim?

A. Yes, it is.

Mr. MINICUS. Thank you, sir.

By Mr. GESELL:

Q. One question, Mr. Swint: You say there was a difference between the quota language in 1013 and the equal rights language in Defendant's Exhibit 1001. Will you explain what that difference is and what you understood by the term "equal rights"?

A. Well, my interpretation of the term "equal rights" meant that we had a right to the same extent as La Cellophane did to go out and sell all we could in those countries.

Q. Supposing under the equal rights agreement you sold more than La Cellophane, what happened?

A. Well, they weren't very efficient in their sales.

Q. Suppose they sold more than you, what happened?

A. We had fallen down.

Q. Did you understand that the term "equal rights" involved any agreement to quota or divide business with the French?

A. No, I did not.

9182 Q. Was the agreement, Defendant's Exhibit 1001, administered on a quota basis?

A. Not at all.

Mr. GESELL. That is all.

The COURT. You are excused, sir.

Mr. GESELL. We will call Mr. Walter Carpenter, your Honor.

WALTER S. CARPENTER, a witness called by the Defendant, being first duly sworn, testified as follows:

Mr. GESELL. If your Honor please, Mr. Carpenter is Chairman of the Board of the du Pont Company, previously its president, and he has for many years occupied key executive positions in the company.

Among his many duties Mr. Carpenter was a Director and Chairman of the Board of the du Pont Cellophane Company.

He will testify concerning the early negotiations with the French and the organization and operation of the du Pont Cellophane Company as a corporate entity, and he will also deal with the Company's policies in the matter of cellophane prices and capacity.

Direct examination by Mr. GESELL.

Q. Mr. Carpenter, I want first of all to indicate what your positions were with the Company at certain times in the period we will be discussing later in the testimony.

9183 I understand that from January, '21 to May '26 you were treasurer of the du Pont Company?

A. That is correct.

Q. When did you first start to work for the Company?

A. 1907.

Q. And I understand you became a member of the Company's Executive Committee and a vice-president in May, 1919, is that right?

A. That is right.

Q. And that you continued on the Executive Committee until January, '48?

A. That is correct.

Q. And you became president of the Company on May 20, 1940 and continued in that office until January 19, 1948, is that correct?

A. That is correct.

Q. And that since '48 you have been Chairman of the Board of the du Pont Company?

A. That is correct.

Q. Now, what was your official position, Mr. Carpenter, with the du Pont Fiber Silk Company or Rayon Company as it is known in this case?

A. I was a member of the Board from the organization of that company, which I think was in 1920, up until '29, and in '29 I was Chairman of the Board until that company
9184 was dissolved in '36.

Q. Will you tell us in the same way what your connection was with the Du Pont Cellophane Company?

A. I was a member of that Board throughout the existence of that Board and I was Chairman of that Board from 1929 to '36.

Q. Now, the record shows in this case, Mr. Carpenter, that prior to the formation of the du Pont Cellophane Company, the du Pont Company had had business relations with the French Comptoire group in rayon. Can you tell us the circumstances under which du Pont and the French interests happened to become associated together in the manufacture of rayon in the United States and what that relationship was?

A. We were interested toward the end of the First World War in developing new industries and particularly in this connection in developing the manufacture of what was then called artificial silk from nitrocellulose. We had an experimental plant located here at our experimental station endeavoring to develop the process to do that.

We had achieved considerable success in that development, but it was thought wise at that time to endeavor to secure what information we might be able to get from France, from the so-called Chardinet interests, which were then interested in the manufacture, or engaged in the manufacture of artificial silk from
9185 nitrocellulose. And a representative of the du Pont Company was sent over to France for that purpose, and while over there he developed that indications rather suggested that the

nitrocellulose silk was on its way out and the viscose silk was becoming increasingly more important.

He learned that the Gillet interests in France at that time were the principal French interests engaged in the manufacture of viscose rayon, and he wired back and asked permission to see them. He did see them; and out of that and subsequent negotiations eventually resulted a contract between the du Pont Company and the French interests providing for the setting up of the du Pont Fiber Silk Company, as it was then called, in which the du Pont Company, I believe, had about a 60 per cent interest and the French had a 40 per cent interest.

That company started in business about 1920 and had been carried on with considerable success up until this later date when we became interested in cellophane with the same interests.

Q. Who was the president of that company?

A. Leonard Yerkes.

9186 Q. And you have said that you were chairman of the board of that company and a director, is that right?

A. I was not chairman of the board at the start of that company, but from 1929 on.

Q. Did the French interests have representatives on the board of the Rayon Company?

A. Yes, they did.

Q. When I use the word Rayon Company, I mean fibersilk, or rayon. Can you tell us who the French representatives on the board were?

A. Their American representatives were Mr. Henry Blum and Mr. Albert Blum, and Mr. Benjamin Paskus.

Q. Who were those gentlemen? They appear later in this case as the French-American representatives on the Cellophane board. Can you tell us who they are?

A. The Blums operated the United Peace Dye Works, a company which was engaged in the textile industry in this country, a company in which I believe the Gillets may have had some interest, but I am not sure of that. But at least the Blums acted as the Gillet representatives here; and Mr. Paskus was their lawyer.

Q. To what extent did the French representatives in this country participate on the board of the Rayon Company and in the operations of that company?

A. Well, they were very diligent in their attendance at board meetings. The board, of course, did not participate

9187 very much in the actual operations of the company.

Q. By the time that you became interested in Cellophane, had the rayon venture with the French been successful and profitable?

A. Yes, very.

Q. How did du Pont come to learn of Cellophane, as you recall it?

A. That was brought to our attention, I don't recall in what year, perhaps around 1921, by the French interests. I think both Mr. Gillet and the Blums spoke to our people about that and endeavored to interest us in taking up the manufacture of it in this country.

The COURT. The individual was not named who made the first journey to France.

The WITNESS. He was Walter Richards, and he went over representing the development department.

By Mr. GESELL:

Q. Who carried on the actual negotiations with the French interests for the cellophane rights in this country on behalf of du Pont?

A. I think Colonel Spruance and Dr. Sparre were the most active.

Q. Both of those gentlemen are deceased, are they not?

A. They are.

Q. To what extent, Mr. Carpenter, were you advised at the time concerning the course of the negotiations and the
9188 major developments in them?

A. I think in a general way I was kept in touch with that.

Q. Do you recall being familiar with them at the time?

A. Yes.

Q. What arrangements were concluded with the French as a result of these negotiations? Can you outline to us generally what the arrangement was?

A. The arrangement took the form initially of an option agreement with the French under which we were given some four or five or six months to make a study of the situation. That eventually culminated, as was contemplated, in a contract which was executed I believe about June, 1923, which provided for the setting up of the Cellophane Company in this country, in which there was to be participation by both groups. A million dollars was subscribed and put into the treasury of that company, and that was put in entirely by sixty per cent of the stock, of which 52 sixtieths was subscribed to by the du Pont Company and 8 sixtieths by the French. Then in return for the exclusive rights to all the French processes and patents and know how for the North American continent, the French were given forty per cent

of the stock. That amounted to forty thousand shares, I believe, out of the one hundred thousand shares.

Q. What did the du Pont Company contribute to this venture, or this company, in addition to the capital?

9189 A. Well, we undertook to provide management and also the du Pont name was used in this connection.

Q. Did you receive any shares for the management and for the du Pont name, or were the only shares you received for cash?

A. The only shares we received were those that we paid cash for, fifty-two thousand shares, for which we paid something like $833,000.

Q. How did it come about that the French interests had a stock participation in the manufacture of cellophane by du Pont here?

A. They got that in return for the patents and processes that they contributed to the company. It was only in that way the company could go into business.

Q. Did you ask them to join with you as partners in this venture, or did they ask to join with you? How did that come about?

A. I think perhaps they told us. In any event, they contributed to the patents and processes and were entitled to it.

Q. Now there are certain provisions—we have it in evidence—in the charter and by-law of the Cellophane Company which require the vote of a specified number of directors to make certain commitments, and which require seventy-five per cent vote of the shareholders to make other commitments. Do you recall

9199 in a general way those provisions of the charter and by-laws?

A. I can recall some of them. There was a certain limitation on salaries; I think that was $10,000 a year on salaries. There was a limitation of purchases by the Cellophane Company from the du Pont Company. There were certain restrictions with respect to the issuance of additional stock or the mortgaging of the property, or the changing of these provisions.

Q. How did it come about that those provisions and others of the same type were written into the charter and by-laws of this company?

A. Well, the French insisted on it. There was also the provision regarding the cumulative voting, so that they were always assured of representation on the board, and a provision that that should not be changed.

The COURT. We will recess for lunch until 2:00 o'clock.

(At this point recess was taken until 2:00 o'clock the same day.)

9191 2:00 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

By Mr. GESELL:

Q. When we recessed, Mr. Carpenter, we were discussing the early arrangements with the French leading to the formation of du Pont Cellophane Company, and had just discussed the by-laws and charter provisions. What is your recollection as to why du Pont Cellophane Company's rights under the patents and technology of the Frence were limited territorially?

A. Well, that was the best we were able to get from the French.

Q. They were not prepared to license you broadly for the world under their processes?

A. No.

Mr. MINICUS. Your Honor, I think this witness can testify without being led to that extent. That was an extremely leading question.

The COURT. Try to heed Mr. Minicus's admonition.

By Mr. GESELL:

Q. Why was the license to the process exclusive to the du Pont Cellophane Company?

A. That we insisted upon.

Q. Was there any understanding or arrangement with the French interests as to cellophane that was broader or
9192 that went beyond the formal written contracts that were executed at the time between the parties?

A. No.

Q. At the outset, Mr. Carpenter, who were the principal officers of the du Pont Cellophane Company.

A. Mr. Yerkes and Mr. May.

Q. And you started off first as a director and then became chairman of the board of the Cellophane company?

A. That's correct.

Q. Were the officers of the du Pont Cellophane Company the same or different than the officers of the Rayon Company?

A. They were identical.

Q. During the time the rayon and cellophane companies were in operation—that would be up to 1936, I believe the record shows—did you have other duties other than as a director and chairman of the board of those two companies?

A. Oh, yes, I did.

Q. What would you estimate was the amount of time you were able to give during that period to cellophane problems, as opposed to your other duties?

A. I don't suppose I was able to give more than five or ten per cent of my time.

Q. After you eliminated the companies in 1936, and the cellophane and rayon businesses were carried on as one of the departments of the company, what was the extent of your contact and relation with cellophane matters?

9193 A. Well, somewhat the same in a way. I continued at that time as a member of the executive committee of the company, and the cellophane department reported to the executive committee. The cellophane department was a part of what we called the rayon department, and the whole department reported to the executive committee, which was in charge of the operations of that company, of that division.

Q. Going back to the period the du Pont Cellophane Company was in being, how frequently did the board meet?

A. Once every month.

Q. Where did it meet?

A. Well, it is my recollection that up until the time of the consolidation of those companies with the du Pont Company, that we met in New York and usually at the offices of the United Peace Dye Works.

Q. Were the meetings of the Cellophane Company held at the same time or separately from the meetings of the Rayon Company?

A. One was held right after the other, but they were both held in the same morning.

Q. And I believe you said that the French representatives in the United States on the boards of the two companies were the same?

A. Yes.

Q. Did those French representatives, the two Blums and Mr. Paskus, attend the meetings of the Cellophane Company?

9194 A. Yes, very regularly.

Q. Did some of those gentlemen hold stock in the du Pont Cellophane Company?

A. Yes.

Q. How long did these board meetings take, Mr. Carpenter?

A. It is my recollection that we used to go in the session around half past nine or ten o'clock in the morning, and they would last the balance of the morning, and then we would all have lunch together.

Q. What sort of problems came up to the board of the Cellophane Company for consideration?

A. We would have the reports covering the operating results of the previous month. We would have any special problems, any labor problems, any requests for appropriation for plant extension, or any considerations of broad policy concerning the operations of that company.

Q. To what extent were matters of price, or appropriation of funds for research, discussed at these meetings?

A. Well, appropriations of funds for research would be discussed. Price changes were not subject to approval of the board, as I recall, though they were occasionally discussed.

Q. Were representatives of the management of the company present at these meetings?

A. Yes. Mr. Yerkes and Mr. May were always present.

They were most of that time, at least, members of
9195 the board, I think the record shows?

A. They were.

Q. Do you recall whether or not the French representatives actively participated in the discussion of the policies and matters that came up?

A. Oh, yes, they were very much interested.

Q. To what extent were they informed about the company's operations?

A. They were as well informed as the others. They received the same reports that the other directors received; and those reports were fully discussed there. I know of no reason why they should not have been just as well informed as the others. The two Blums, of course, were able operating executives themselves in their own work. Mr. Paskus was perhaps a little less acquainted with operating matters.

Q. Do you recall that du Pont Company bought out the minority intersts of the French in the rayon and cellophane companies?

A. Yes.

Q. About when was that?

A. 1929, I believe.

Q. What did you have to do with the acquisition of the French shares?

A. I negotiated that arrangement.

Q. With whom did you negotiate?

A. Principally through Henry Blum. I say through
9196 Henry Blum; of course, the principals on the other side were the French interests, and he conferred with them.

Q. Will you relate the course of those negotiations that led to the acquisition of the French shares?

A. I discussed the matter first with my associates here to ascertain their interest in the arrangement, and after I obtained their approval I got in touch with Mr. Blum and we discussed the matter first of the Rayon Company and then of the Cellophane Company, and he in turn was in communication with the French interests by phone all during those negotiations, and eventually we came to an agreement.

Q. Why did du Pont desire to purchase these minority interests?

A. Well, we thought it was a good buy. We thought the prospects of both of those interests were very good, and we consolidated on the basis of an approximation of the comparative earnings of both of those companies at the same time. That is, the consolidation was effected on the basis of the relationship of the du Pont earnings to the earnings of these other companies, and we felt the prospects were that the business of those companies would grow at least as rapidly as the business of the du Pont Company itself, and therefore it should result in a good profitable deal for the company.

Q. What did the French end up receiving for their shares in the rayon and cellophane companies?

A. They received shares in the du Pont Company.

9197 Q. Approximately what was the value of the French shares in the du Pont Company at the time, that they received for their cellophane interests?

A. I recall that the valuation of the du Pont shares given in exchange for the minority interest in the Rayon Company amounted to about 70 to 75 millions of dollars, and in the case of the minority interest of the Cellophane Company it was about 12 million dollars, I think.

Q. Were those shares given to the French in compensation for anything other than the value of their interest in those two concerns at the time?

A. No.

Q. At the time the acquisition was made, was provision made for continuation of the licensing of the patents and technology between the du Pont Cellophane Company and the French?

A. Yes, it was carried on as it had been before.

Q. Why was that continued?

A. I recall it was primarily on the insistence of the French at that time. I think they were more interested in that than we were, though we were very happy to have continued the arrangement.

Q. Following that agreement to buy out their share, the record shows that the French continued to serve as directors of du Pont Cellophane Company. Was there any discussion of that in the negotiations?

9198 A. Yes. It was arranged that that board should continue, but it continued more or less at the sufferance of the du Pont Company. That is, it was possible, as I recall, under the agreement that we could change that at any time that we chose.

Q. The French did in fact continue as directors up until 1936, did they not?

A. Yes.

Q. Was their participation—that is, the French directors' participation—in the affairs of the company different in any way after the acquisition of their shares than it had been before?

A. No, I don't think so. We shifted the location of the meetings at that time. Thereafter, as I recall, we held most of our meetings either here in Wilmington, and then we had an arrangement that each spring and each fall we would hold a meeting at one of the plants of the Cellophane Company. I think we ceased after that to hold meetings in the United Peace Dye Works, which we had before.

Q. Did the French representative continue to participate in the meetings?

A. They did, yes.

Q. Coming along a little further, do you recall that sometime in late 1929 La Cellophane was considering taking shares in the Belgian SIDAC Company?

A. Yes.

9199 Q. What problems if any did that development give rise to as between du Pont and La Cellophane, under the contracts that were in effect?

A. Under the contract that we had with the cellophane group in France they were not to participate in the American business. They were not to come over here and they were not to participate indirectly in the American cellophane business. The effect of their taking an interest in SIDAC was that SIDAC owning an interest in Sylvania here gave them directly a participation in the American market. We felt that was in a sense a departure from the terms of the contract.

Q. Were there discussions at the time in the board as to what steps du Pont should take in view of that situation?

A. Yes.

Q. What do you recall was the nature of the discussion relating to that and the decision arrived at as to how you would be compensated?

A. Well, there were considered a number of different arrangements that might be made which would serve as a compensation for the injury to ourselves and to the benefit of the French. We considered a cash compensation, we considered taking a stock interest in the Sylvania Company, and then we considered certain changes in our territorial sales privileges, and eventually it worked out that

we took a larger participation in the South American market, as I recall.

9200 Q. Did you understand that at that time or any other time, that du Pont Cellophane Company, or the du Pont Company, entered into any agreement or understanding with all European manufacturers studying up quotas and dividing territories?

A. No. The arrangement was purely with the La Cellophane Company as an adjustment of their original arrangement with us.

9201 Q. Now, you have mentioned that after 1936 the rayon department would report to the Executive Committee on matters relating to cellophane. Can you tell us a little more what sort of problems relating to cellophane would come up before the Executive Committee or would come to your attention as president of the du Pont Company after '36?

A. Well, we would get full operating reports of the activities of the cellophane industry during the course of the previous month. We would get any reports or appropriation requests contemplating important expenditures of money or expansion of plant capacity. The reports that we received at that time in the Executive Committee were very similar to those that we had been accustomed to receiving as directors in the Cellophane Company.

Q. Now, we have heard a lot in the case about the du Pont Executive Committee. Perhaps you can tell the Court a bit more about how it functions. Do these reports just come up and lie on the table or are they a subject matter of active discussion at meetings, and if so, how does that come about?

A. No; they are discussed very fully, and there are many matters that are dealt with in those reports that require formal approval, any appropriation arrangements, any licensing arrangement, and contracts of that sort—commitments of that sort,

9202 would require specific approval of the Executive Committee.

Q. Well, to what extent do the people running the cellophane business, for example, appear before the Executive Committee in connection with such matters?

A. They very often appear before the Executive Committee in connection with the presentation of any of those requests for approval of arrangements.

Q. Mr. Carpenter, what was du Pont's purpose in entering into the cellophane business? Why did you go into it?

A. Well, the du Pont Company was interested in enlarging its activities in industry, and we were offered this opportunity of acquiring a process for the manufacture of what was a compara-

tively new product, and it appeared to us from making an investigation, such investigation as we could of the markets, and also the process itself, that we could institute the manufacture over here and produce that product and make money with it, which was our primary objective, obviously.

Q. Can you tell us on the basis of your experience what du Pont's objectives were in the development of its cellophane business and how those objectives were carried out?

A. Well, when we originally went into this manufacture, the product had a very narrow market; it was made in France and sold here. I think it was sold at a price of something like $2.50 a pound. For that reason it had a very limited market. And when
9203 we undertook to manufacture it here we started out with a plant with a comparatively small capacity but one which might be enlarged easily, and we undertook from the start by research methods and operating methods and the best methods that we knew how to apply, toward reducing the cost and improving the quality of the product.

We felt that with a very much lower cost product that there would be an opportunity for a large market in this country as a wrapping material, and as we continued with our efforts in that direction, we were successful in reducing the costs, and as we continued in our efforts to introduce that into the wrapping industry we found success in expanding the markets.

So that while we were able to reduce our costs in order to make this available in more and more markets, more and more channels of consumption in the wrapping industry, we were nevertheless able to reduce our costs even faster, so that we were able to continue operating at a satisfactory profit during that period, so that we achieved the results which we sought, that is, of manufacturing a product useful for American industry, making it available for an ever-wider range of customers and doing so on a basis which yielded a satisfactory return on our investment.

Q. Well, during this period, to what extent in planning the development of the business and seeking the objective you have mentioned were you concerned with preventing
9204 others from entering the cellophane business or suppressing the competition of Sylvania?

A. Well, for a long part of that Sylvania didn't exist. They didn't come into the market, as I recall, until the end of the 20's—I can't recall just when they did come in, but initially they were not present at all, so obviously they weren't a matter of concern to us.

But after they came into the market, I don't think we gave very much consideration to the question of their competition. When they initially started out, they of course had a very small produc-

tion, and at no time did they have a production which was more than let's say a quarter to a third of our own.

Now, our interest was not in getting a part of that market, which was only a quarter to a third of our own—we were far more interested in endeavoring to secure some portion of the enlarged market of the wrapping industry, which may have been five, ten, or twenty times as large as could have been offered by endeavoring to get a portion of their markets. There was a great big market out there, if we could make our product satisfactory in quality and in price, which, as I say, may have been twenty times or thirty times the size of the market which was occupied by the Sylvania Company. And that was our objective.

Q. You say you weren't concerned with suppressing
9205 Sylvania's competition. To what extent were you concerned with preventing others from entering the cellophane business in this policy, in carrying out the objective you have given us?

A. Well, I don't recall that the matter was one that preoccupied our attention at all.

Q. Were your policies in the development of cellophane in any way as to price or capacity substantially different than your policies in the development of other new products which du Pont undertook from time to time to manufacture during the 20's and 30's?

A. No, I think not.

Q. Specifically, Mr. Carpenter, what was the broad consideration that governed your program for price reductions as to cellophane?

A. Well, I meant to indicate that the purpose of reducing our price and also improving our quality was to broaden our market. At $1.60 there was no broadening of the market in cellophane, and we were quite clear that would be the case, and for that reason, as I said, we endeavored to get our costs down, which made it possible to reduce prices, and by reducing prices further to extend our markets into this large wrapping field.

Q. What part did you play, Mr. Carpenter, if any, in the price policy as to cellophane and in the implementation
9206 of that policy?

A. Well, I had very little to do with the actual setting of the price. As a general philosophy I was always in favor of the reduction of the price as we were able to do so by the reduced costs, and I think that I consistently urged that on the management.

Q. Do you recall discussing it with the management?

A. Yes; many times we discussed it.

Q. Now, in your own mind or in connection with any of these discussions, do you ever recall an instance where the price of cello-

phane was reduced primarily for the purpose of suppressing or preventing competition?

A. No, I do not; as a matter of fact, as I recall it, the whole purpose of the reduction of the price was to increase competition, for in that way it increased our capacity to enter these new markets and compete in those markets, which were for the most part lower priced markets than cellophane.

Q. Do you recall an occasion in 1930 as to which we have evidence in this case when du Pont announced a cellophane price reduction, or series of price reductions in advance?

A. Yes.

Q. What did you have to do with that?

A. Well, I think I initiated that. That was a rather unusual participation, however, on my part in the pricing of cellophane. That did not represent the part I usually
9207 played in that, which was very small. But in that case we had a very unusual situation. We had a demand which was far in excess of our own production. There was a good deal of complaint, as I recall, in the market about our lack of capacity to supply our trade, and as the market tightened up a little bit, it seemed that everybody wished to increase their inventories and increase their purchases.

We had an additional plant capacity coming in some months after that, within six or eight months, as I recall, and it seemed to me that if we could institute a form of pricing there which would discourage the trade from buying at this time and would encourage them to draw on their inventories rather than attempting to build up their inventories, that the trade would be very much better served, and a good many of these complaints which we were getting would be stopped.

So it was suggested that we might put in a price reduction which would take effect by stages over the future months. I don't recall what those figures were, but we said, all the deliveries over the next two months would be billed at two and one-half cents off, all for the following two months another two and one-half cents off—that is the way the program worked in order that the buyers would be encouraged to postpone their purchases.

I say it was a rather unusual move because one doesn't
9208 usually attempt to discourage one's buyers from buying your product. Here we did actually do this in order to encourage the buyers to postpone their purchases from us.

Q. Did you in fact make price reductions?

A. We did.

Q. Did you discuss your reasons as you have related them with anyone else in the company, and if so, whom?

A. Well, I recall discussing it, of course, with Mr. Yerkes.

Q. Who did the suggestion originate with, Mr. Yerkes or with you?

A. Well, it originated with me.

Q. Now, with respect to capacity, Mr. Carpenter, am I correct in understanding that all major additions to cellophane capacity either came before the du Pont Cellophane Company Board while it was in existence or later came before the Executive Committee while you were a member of that in the period from '36 to '48?

A. That is correct.

Q. Who would present the proposals for expansion?

A. Well, it would be presented by the president of the Cellophane Company while the Cellophane Company still existed, and after that it would be presented by the General Manager of the rayon department, who happened to be the same one, Mr. Yerkes, in both cases.

9209 Q. Do you ever recall an instance where the purpose or expected effect of a particular cellophane expansion was to be to create capacity beyond that which the Company thought was reasonably necessary in the immediate future?

A. No, I don't, and I always thought that we didn't enlarge rapidly enough.

Q. Well, now, will you explain that?

A. Well, I think it is a good policy to have capacity always in excess of the amount of the sales, so that the production department will be constantly putting pressure on the sales department to dispose of their product. I think throughout a long period of years there the situation was just the reverse. I think we were in a sense over-sold during much of that period. The sales department were tremendously active in the development of new fields, and with the reduction of the prices from time to time they were able to increase orders, and it seemed to me that they were too often ahead of our production capacity.

Q. In connection with these various capacity additions that came up before the Boards at various times, did you ever seek to achieve some specific market position or percentage of the cellophane business?

A. No.

Q. In carrying out the program that you have described of price reduction and plant increases, and your relations

9210 with the French, and so forth, were you or your associates, to your knowledge ever conscious of taking some step or steps which were illegal or violative of the law?

A. No. I never recall taking a step which was contrary to the advice of our attorneys.

Q. Did you carry out the program and objectives that you have described for the purpose of preventing anyone from competing with you or suppressing their competition?

A. No.

Q. I want to turn for a moment to the Sylvania license agreement, Mr. Carpenter. I suppose you recall that a suit was brought by du Pont against Sylvania for infringement of du Pont's moistureproof patents?

A. Yes, I do.

Q. And you recall that the suit was settled?

A. Yes.

Q. Who conducted the negotiations with Sylvania on behalf of du Pont?

A. Well, as I recall, Mr. Yerkes and Mr. Hatt did most of that.

Q. What part did you play in the negotiations?

A. Well, I don't think I played any immediate part. The matter no doubt came to the Board for approval and it was discussed at the Board.

Q. Do you recall such discussion?

9211 A. Well, I think I do. I would hate to say positively that I can pinpoint any particular discussion, though I recall it was discussed, because it was a matter of considerable importance.

Q. Do you recall more specifically whether or not you were consulted or gave advice as to whether or not you should settle with Sylvania?

A. Yes, the matter was reviewed by the Board.

Q. You do recall that?

A. Yes.

Q. Did you favor settlement or were you opposed to settlement?

A. I favored settlement.

Q. And will you tell us why?

A. Well, the alternative to settlement was a lawsuit, which are always very disagreeable and long, drawn-out. Probably it would have been months and years before we would have been able to settle. After we had settled—after the lawsuit had been over, we would either have been defeated, in which case we would have lost everything with respect to our position which we at that time we thought we had, or we would have won.

If we had lost, obviously there would not have been very much purpose in going ahead with it. And if we had won the suit, it seems to me that we would not be in a very much 9212 different position than we were at that time—that is, we would even at that time have to consider what we would do opposite Sylvania.

To me it was unthinkable that we would close down Sylvania. I think that our whole disposition under circumstances of that sort would be to license them to manufacture. That we had an opportunity to do before the lawsuit, and so it seemed to me that there was no particular point in carrying on the lawsuit.

There was also, I might say, the chance that the suit might have been lost. My recollection is that both our attorneys and our technical men were sure that we had an iron-clad suit—an iron-clad patent, I mean. But in spite of that sometimes the Courts don't agree with the lawyers and the technical men.

Q. Did you understand that there was any agreement or understanding or arrangement made with Sylvania at the time of the settlement over and beyond the written contract?

A. No.

Q. You didn't understand there was such an agreement or you did?

A. I did not understand there was any agreement.

Q. There was no such agreement?

A. No.

Mr. GESELL. That is all.

9213 Mr. MINICUS. Could we have a five-minute recess at this time, your Honor?

The COURT. We will take a five-minute recess.

(At this point a brief recess was taken.)

9214 Cross-examination by Mr. MINICUS.

Q. Mr. Carpenter, in the early part of your direct testimony, you spoke of the French interests. Could we define that term a little more definitely? For example, was there a focal point for what we have referred to as the French interests?

A. There was, so far as we were concerned, in that we I think primarily looked to Mr. Edmond Gillet.

Q. I was thinking more in terms of the Comptoir. What was the Comptoir?

A. That has always been a bit of a mystery to me, Mr. Minicus, but as I understand it, the Comptoir was a company in which a number of rayon companies, and also the Cellophane Company in France, had an interest. Whether or not it was definitely incorporated and they were stockholders, or just what form it took, I don't think I ever knew.

That Comptoir in some way contributed facilities or services of some sort to these companies, but I was never sure of that.

Q. Do you know whether the Comptoir itself was an operating company in the field of rayon?

A. I don't think it was.

Q. Do you know which of the French interests was the operating company in rayon?

9215 A. My recollection is that our contract was signed by a number of them.

Q. This contract in rayon, did that also provide for territorial divisions somewhat the way the cellophane contract did?

A. I don't think that the arrangements were exactly the same. I don't think the territories were exactly the same, but I am a little hazy about that.

Q. Was the Rhodiaceta part of the Comptoir group?

A. Well, it might be said to be a part of the Comptoir group in that the same people that were interested in the Comptoir also, we understood, were part owners of the Rhodiaceta. As a matter of fact, I am not sure that the Comptoir didn't own part of the Rhodiaceta.

Q. And Rhodiaceta's interest was acetate?

A. Yes, and later on nylons.

Q. And there were agreements also between du Pont and the Rhodiaceta in nylon and acetate?

A. Well, in nylon, of course, in more recent years. In acetate, yes.

Q. Was the Comptoir also affiliated with a French company that manufactured caps and later on bands?

A. They were associated in some way.

Q. Do you recall that the operating company manufacturing caps in France was originally referred to as Capes

9216 Viscose?

A. Yes.

Q. And then the name underwent successive changes. At one time it became Societe' Francaise des Crins, and subsequently, as referred to in our complaint, Viscose Francaise. There were those changes of names, all stemming from the original Capes Viscose patents. Is that your understanding?

A. It isn't my recollection, because I am very hazy about that.

Q. Returning to 1923 and the original agreements between the du Pont interests and the French interests, what is your understanding of the geography of the territorial divisions that were made in that agreement?

A. We were given the exclusive rights for North America, and that meant north of the Isthmus, as I recall it. There was later developed some discussion as to what islands here and there were included, but that was relatively minor.

Q. As far as du Pont was concerned, the operating field for La Cellophane would have been the rest of the world, at that time?

A. What's that?

Q. If du Pont acquired North America north of the Isthmus, then it is assumed that what remained to La Cellophane
9217 would be the world markets outside of North America, isn't that right?

A. So far as we were concerned, yes.

Q. Do you recall that at that time it was further understood that the French might license others, thereby apportioning away additional parts of their territories?

A. Yes.

Q. So that in 1929 there were some arrangements under way with Kalle, the German company; and do you recall that the French had negotiations with Kalle and did exactly what had been anticipated back in 1923: they licensed Kalle to operate in certain countries in northern Europe—we could say roughly Germanic countries up in there. Do you recall that?

A. In a very general way.

Q. After that fact was accomplished, did du Pont also enter into an agreement with Kalle about 1929?

A. I don't recall the date, but it is my recollection that we had some sort of a process exchange agreement with Kalle. I think, as I recall, that was anticipated in the original cellophane contract.

Q. Yes, I think we have covered that, Mr. Carpenter. I don't believe that Kalle itself was anticipating, but it was anticipated that others would come in?

A. Yes.

Q. If the French had already licensed Kalle and given
9218 Kalle as an operating territory part of what had formerly been their markets in northern Europe, why was it necessary for du Pont to directly execute an agreement with Kalle?

A. I may be wrong about this but I thought that the original arrangement that we had with the French—that is, the original contract—contemplated that we would exchange processes with their licensees. Maybe I am confused about that but that is my recollection.

Q. Do you recall correspondence outside of the agreement, Mr. Carpenter, between du Pont and Kalle setting forth certain territories in which Kalle would operate, and other territories in which du Pont would operate, and that Kalle agreed to keep out of the du Pont territory and du Pont agreed to keep out of the Kalle territory? Do you recall anything of that nature?

A. No, I don't.

Q. There is evidence, Mr. Carpenter, to that effect. It is already in the record. Do you know whether there were ever any discussions in the Executive Committee about why this direct agreement was made between the two parties as to territories; that is, Kalle and du Pont?

A. No, I can't recall any discussion of it. I don't recall the agreement itself.

Q. There were no representatives of Kalle on the du Pont Cellophane Company board, were there?

9219 A. No.

Q. Later, in 1935, do you recall that once again La Cellophane appointed a licensee, this time in England, and named British Cellophane Limited?

A. Yes.

Q. And once again du Pont took part of the world territory that it had retained, and took out the British Empire, and that was designated as B. C. L.'s territory?

Mr. GESELL. I object.

A. Did you say du Pont?

Q. No, La Cellophane. If I said du Pont I was mistaken. Then again, when that fact was accomplished, du Pont and British Cellophane negotiated what became the ultimate execution of a contract, and in that contract itself there was once again spelled out this territorial arrangement, roughly North America for du Pont and roughly the British Empire for B. C. L. Do you recall that?

A. I think I do.

Q. Why was that promise to regard exclusive territory necessary between du Pont and B. C. L. when du Pont never had any interest in the B. C. L. territory?

A. Well, if it existed, and that is pure recollection on my part, it would seem to me very natural that that arrangement was implicit in the original agreement with the French. That is, that we would enter into a process exchange agreement with their licensees.

9220 Now, it was their territory, not ours. That is, La Cellophane's territory, not du Pont's territory.

Q. That, Mr. Carpenter, is the point that is giving me trouble. Why was it necessary for du Pont to assure British Cellophane Limited that they would not operate in that territory directly when du Pont never had any rights to operate up there, and why was it necessary for B. C. L. to assure du Pont of the exclusivity of du Pont territory if that was all taken care of in the du Pont-La Cellophane agreement?

A. I don't know why it should have been repeated there. It didn't change the situation, so far as the du Pont Company was concerned.

Q. Were there any representatives of British Cellophane Limited on the board of directors of the du Pont Cellophane Company?

A. No.

Q. We have certain agreements in evidence, Mr. Carpenter, relating to Canadian Industries, Limited, and du Pont. There the situation was slightly different, and perhaps you will permit me to sum it up and if you will agree with me we will save some time.

The situation altered slightly there in that in the agreement, du Pont was working within its own territory, to wit, North
9221 America, and because C. I. L. was up there in Canada for one reason or another, du Pont this time licensed C. I. L. for a piece of the territory it had acquired from the French. Is that just about the way it went?

A. Yes.

Q. You mentioned in your discussion with Mr. Gesell certain facts that Frenchmen, or French-Americans, were on the board of the du Pont Cellophane Company, Inc., and that there were certain by-laws that governed voting rights, and so on. What had that to do with the division of territories between du Pont and C. I. L.?

A. I can't recall that it had any bearing on it.

Q. Then what justified this division of territories between du Pont and C. I. L.?

A. That fits into a background of our relationship with C. I. L.

Q. Pardon me?

A. That background was roughly that we looked upon C. I. L. as our operating arm in Canada, and when business in Canada was developed sufficiently to warrant the placing of capacity in Canada, we assisted them in setting up that capacity to supply that market.

Q. Returning then to La Cellophane and du Pont's relations, how would the fact of the French stock ownership, the French directors, the regulations in the by-laws, justify the division of
9222 territories between du Pont and La Cellophane, the original division of markets or territories?

A. Are you still talking about the Canadian?

Q. No, I am talking about La Cellophane. I am back at 1923. We have left C. I. L., Mr. Carpenter.

A. Will you repeat the question, please?

Q. Yes sir. In your direct examination you spoke of the French stock ownership, the representation on the board of directors by Frenchmen, certain regulations in the by-laws, and I was wondering whether in your mind those facts had any connection with the division of territories that was effected between du Pont and La Cellophane?

A. Do you mean the fact that the French had representation on the board had anything to do with the division of territory? Of course, these things were all part of the same original contract. I am not clear that I get the significance of your question.

Q. My question, sir, is addressed only to this. Is there any connection between this French representation on the du Pont Cellophane Company and the division of territories between La Cellophane and du Pont?

A. Not that I know of. I may not have reached the point that you are trying to make, Mr. Minicus.

Q. Perhaps I could sum it up this way, if there is no objection to it. It has been alleged earlier in the trial by counsel for the
9223 defendant that this du Pont Cellophane Company was in effect a joint venture between E. I. du Pont and the French interests, and if I understand the position correctly, that in some way or other this fact of joint venture justified the division of markets, or that that was one of the justifications for the division of the markets. Have you any such understanding, sir?

A. The division of markets resulted from the original negotiations, and it was one of the many terms provided for in the original contract.

Q. Then the division of markets resulted from nothing more than the adverse factors involved in the negotiation, and a coming to a meeting of the minds. It was just an agreement?

A. That's right.

Q. Do you have any recollection, Mr. Carpenter, of the facts attendant upon du Pont's entry into the manufacture of cellulose caps in 1928?

A. Not very clearly.

Q. Do you know that there was at least at one time evidence of the fact that the parties involved in the manufacture of caps and bands on an international scale, to wit, du Pont, the French manufacturer, and the British manufacturer, had agreed in effect to divide markets?

A. I don't think my recollection of that is clear enough to affirm it or deny it, Mr. Minicus.

9224 Q. Now, bearing in mind my discussion so far, Mr. Carpenter, relative to these agreements on the international plane in cellophane, is it correct to say that La Cellophane was the hub of this international relationship, and that in the field of the firm itself, these agreements ran out to du Pont and to B. C. L. and to Kalle. Is that correct?

A. We were all three licensees of the La Cellophane.

Q. And then in turn, you had made agreements with each other: du Pont with Kalle and du Pont with B. C. L.?

A. Yes.

Q. You are not familiar with a similar pattern in the field of caps?

A. No, I am not.

Q. Moving to the early thirties—1930, 1930 and 1931—did there exist concurrently in Europe another organization of cellophane manufacturers, headed up by associated producers of cellophane throughout the world?

Let me re-phrase that question. Are you familiar with the Belgian Sidac?

A. In a general way, yes, sir.

Q. Are you acquainted with the fact that the Belgian Sidac likewise had agreements of one nature of another running to Sylvania and to Italian Sidac and to the English Sidac?

9225 A. My understanding was that they had the arrangement with the American company. I don't think I was at all familiar with their contacts with the other companies.

Q. Then we have La Cellophane, which we have attempted to describe as the hub of one group, and the SIDAC operating in Belgium that was at least connected with the Sylvania Company here. Are you aware of any proprietary interest that ever existed between La Cellophane and the Belgian SIDAC?

A. I understood they had an interest, yes.

Q. Then La Cellophane, who had a stock interest in the du Pont Cellophane Company, also had a stock interest in the SIDAC, is that correct?

A. That is correct.

Q. And the SIDAC, in turn, had a stock interest in Sylvania in the United States?

A. That is correct. I think they did. I assume they did.

Q. Are you able to identify Wolff and Company as an operating company, and Cellophane as a subsidiary of the I. G. Farben Company?

A. I recall the name of the Wolff Company as a cellophane producer.

Q. Was not Kalle a manufacturer of cellophane and caps and bands, and also a subsidiary of the I. G. Farben
9226 Company in Germany?

A. Kalle was a manufacturer of cellophane. I am not positive about the caps and bands, nor do I know who owned Kalle.

9227 Q. Mr. Carpenter, I would like to show you Government Exhibit 1414. Were you in court this morning, sir?

A. Yes.

Q. You will probably recall there was considerable discussion of this document, and I am simply going to ask you, sir, if you are familiar with it (handing Government Exhibit 1414 to witness). The document purports to be an official report of meetings of the 11th and 12th of February, 1930.

A. No, I am not at all familiar with it.

Q. Have you ever seen that document before, Mr. Carpenter?

A. No, I have not.

Q. Will you try to recollect, sir, to be absolutely certain that you haven't seen that document before?

A. Well, I can't say positively that I haven't seen it. I can't recall ever having seen it.

Q. You don't recall at the moment that you have seen it?

A. I do not recall at the moment having seen it.

Q. Now, Mr. Carpenter, I show you Government Exhibit 1013 and ask you to observe this exhibit (handing Government Exhibit 1013 to witness). In the meantime I will explain to you, sir, that that is a letter or a report by Mr. B. M. May to the French for the attention of Messrs. Gillet and Bernheim, that it is signed by Mr. May and Mr. Bernheim, and it is dated March 6, 1930. Are you familiar with that, sir, or have you seen it before?

9228

A. I think I have seen this, though I can scarcely read a word of this.

Q. I am very sorry, sir——

A. But in general I think I am familiar with it.

Q. I think they used up all our typewritten copies this morning.

(Typewritten copy of Government Exhibit 1013 was handed to the witness.)

A. Do you wish me to read this, Mr. Minicus?

Q. I wish you would, sir.

A. I get the general purport of it, I think.

Q. Is it not the entire tenor of that document, sir, that du Pont intends to participate with La Cellophane in any advantages La Cellophane might derive from the arrangements memorialized in the memorandum of February 11 and 12, 1930?

A. Let's see—is that former agreement referred to in here (indicating)?

Q. In paragraph number 2; in the first sentence of numbered paragraph 2 I think you will find that.

A. Yes.

Q. Now, sir, I show you Defendant's Exhibit 1001 that was introduced into evidence this morning (handing Defendant's Exhibit 1001 to witness). Does not subparagraph (c) there—it isn't necessary to read the entire thing unless you desire to, sir; we went into it in quite some detail today—does not subparagraph (c) read, "That in the event of any happening that may result in the elimination of any of the existing companies, except La Cellophane, du Pont Cellophane is to receive always rights equal to those of La Cellophane in the specified countries"?

9229

A. That is what it says.

Q. Now, did you hear Mr. Swint testify this morning that du Pont did not observe production quotas and equal prices with the French in South America?

A. Yes, I did.

Q. Do you agree with his denial, sir?

A. I know nothing to the contrary. I might say that I am not sufficiently familiar with that handling of that South America to be able to affirm what he said, though I have no reason to question it.

Q. Permit me to show you Government Exhibit 1112, which is a letter from Mr. L. A. Yerkes to Mr. Rene Bernheim, of the Comptoir, and dated February 26, 1932. Is this roughly two years after the memorandum of February 11 and 12, 1930?

A. Yes.

9230 Q. If you will look at this copy, sir, my pencil marks won't confuse you. If you will observe the third paragraph on page 1, does that not clearly indicate that du Pont is making their prices in South America on plain cellophane to correspond with the French prices there?

A. That is what it says.

Q. Now, if you will look at the last paragraph on the same page, is ther not there a statement that sales figures in South America have been sent to the French and that the du Pont Cellophane Company shall be very glad to have the French figures as well as those of the others?

A. No, I don't think so. It says, "In regard to the quantities we have sold in South America during the past year we will have these figures accumulated shortly and will forward them to you."

Q. Now, will you just read the last sentence, too.

A. "In the meantime we shall be very glad to have your figures as well as those of others."

Q. This letter then would seem to indicate, would it not, Mr. Carpenter, that two years after the memorandum of February 11 and 12, 1930, there was some exchange of information between Mr. Yerkes and the French with regard to prices in South America and quantities in South America?

Mr. GESELL. Objection, your Honor. He says he has no
9231 knowledge of any of these events. The letters speak for themselves.

Mr. MINICUS. The letter speaks for itself—I am satisfied, your Honor. Thank you, sir.

By Mr. MINICUS:

Q. At this time, Mr. Carpenter, I show you Government Exhibit 1034, which is a letter from yourself to M. Rene Bernheim.

Mr. McGLOTHLIN. I would like this group marked as Defendant's Exhibit 1003.

(Group of wrappings of the Shellmar Products Corporation were marked Defendant's Exhibit 1003.)

By Mr. McGLOTHLIN:

Q. What converting operations does Shellmar perform today? What types of operations?

A. We print and we laminate and we make bags, fabricate bags, envelopes—most any kind of a container—out of flexible material.

Q. Do you print by a variety of processes?

A. We have three processes; one is letter press, one is aniline, and one is gravure.

Q. Speaking of your flexible packaging materials, about what proportion would you say goes to the food industry?

A. I would say that in our business, 70% or 75%, somewhere around there.

Q. Can you give us a breakdown of the sales of the
9264 flexible packaging division of Shellmar in 1951?

A. Yes.

Q. Will you do that?

A. I made notes of the breakdown. I have notes.

Q. Will you refer to your notes and tell us what the breakdown was?

A. In the baking goods it represents 1.4 per cent of our business.

In bread, it represents 4.6 per cent of our business.

Candy, 6 per cent.

Cereals, 8/10 of 1 per cent.

Cheese and dairy products, 3.6 per cent.

Chewing gum, 6.5 per cent.

Crackers and biscuits, 8.8 per cent.

Dried fruit, 1 per cent.

Dried vegetables, 1 per cent.

Dried vegetables, 4.2 per cent.

To food jobbers—that is, various jobbers that sell to food industries—we sell them 2.3 per cent.

To miscellaneous foods; that is, various types of miscellaneous foods represent 7.3 per cent.

Fresh produce represents 1.4 per cent.

Frozen foods represent 2.4 per cent.

Hosiery represents 8.10 of 1 per cent.

Meats and fish represent 5 per cent.

Oleomargarine represents 3.1 per cent.

9265 To paper jobbers on stock items, stock bags and stock wrappings, 1.8 per cent.

To paste goods, 1.4 per cent.

Pop corn and potato chips, 6 per cent.
Rice, 3.2 per cent.
Textiles, 2.3 per cent.
Tobacco, 1.2 per cent.
All miscellaneous products—which can't be classified as any particular item—10.3 per cent.
Industrial uses, 8.1 per cent.
Consumer resale, 2 per cent.
Then there is business that is sent in to us by various solicitors of our packaging goods. They will take an order that they cannot produce, and send it in to us, and that represents 3 per cent.

Q. These percentages you have given are the entire output of that division, are they not?

A. Yes, sir.

Q. Not cellophane alone?

A. No. It was 50 per cent. The percentage of cellophane in regard to our whole production is continually reducing.

The COURT. Did you say it was 50 per cent?

The WITNESS. In 1951 it averaged 50 per cent.

Q. And you say that percentage is reducing?

A. This year it will probably average 45 or 46 per cent.

The COURT. What is the reason for that?

9266 The WITNESS. Because other materials are being used in place of cellophane.

By Mr. MCGLOTHLIN:

Q. Mr. Martin, you have told us of the start of your company, and you have told us of your present sales. Now will you tell us how it was, starting in the late twenties, that you were able to sell cellophane, what you did to sell it, and how you were able to increase your business?

A. Do you want to confine it to cellophane?

Q. Let's confine it to cellophane.

A. When we first started and developed a method, and developed inks that we could print cellophane with, naturally we thought, being a new product at the time, that we could go out and interest some of the manufacturers in using cellophane instead of glassine or some other product. Of course, the price at that time was so high that it was pretty hard to go and convince someone who was paying 75 cents or 80 cents a thousand for wrappers to pay us $2.50 or $3.00 a thousand for wrappers.

So we tried to develop as good looking and as attractive designs as we possibly could, and we would wrap his product in it and show him a display and set it beside his old display, and show him where he could increase his sales if he would use it.

Of course, we had to prove it, and many times we proved it. Sometimes we didn't prove it.

9267 Q. Did all the people you approached agree with you?

A. No, sir. I wish they did.

Q. Did you find it necessary to do anything that has been called promotional selling?

A. Well, we have done promotional selling right from the beginning.

Q. What do you understand by the expression promotional selling?

A. Promotional selling is when you take a product—if I pick up a product and it is wrapped in something else and I say to myself, I think that I can go and sell this customer on our type of packaging and on a better looking package, for instance, I will go to a customer and say, "look, you've got a package here, it has no illustration on it. When a person buys it he's got to be able to read, and if he can't read he doesn't know what is in the package. So you would be much better off with a picture of the product on the outside of the package."

I usually go ahead and have the art department take his product, and we make a beautiful design, as beautiful as we can, and we try to duplicate his product on the outside of it, and we take it in to him, and many times the particular product needs protection. Now, he may be using a package—of course, it depends on the type of product you are wrapping. If you are wrapping yeast, that requires certain protection. If you are wrapping—well, a

9268 good one that everybody knows here would be Lipton's Soup. You buy Lipton's Soup in a package. That is one of the most particular packages on the market, as far as protection is concerned. There is no vapor. They have a chicken fat that becomes rancid with the least amount of oxygen, so you have to make an absolutely tight package. Your laboratory has to develop a sheet, or what we call a barrier. It may be composed of one sheet or three or four sheets.

Q. Of any material?

A. Of various materials, whatever it might be, and the laminate that goes between to keep the oxygen from getting to that chicken fat. Then you have to develop machinery that, after the product is in the package, must make it tight.

The trouble with a lot of packages is that no matter how good your film is, if you don't make a tight package you lose all the advantage of using a good airtight film. But there are many things that go into what you call development. It is protection of the product, and you have to have a product that is good looking, you've got to have a product so that when the wife goes into

the store she will pick it off the shelf in place of picking up something made by somebody else, and the only way to do that is to make it attractive.

Of course, if you haven't protected that product and she gets it home and it is all lumpy, and the package isn't any good and it doesn't protect it, naturally she won't buy it again. So you have to have a good product and a good looking package.

9269 Q. Mr. Martin, I want to show you a coffee bag which I think is a product of your company. Will you tell us how that worked out as a developmental project or promotional project?

A. Coffee is one of the hardest things to package there is in the country. When you grind coffee, when you roast coffee and grind it, it throws off a gas, CO_2 gas. If we were to put that in a flexible package that was absolutely tight, it would blow up. But the trouble with coffee is there are never two batches the same. You go into a coffee roaster like General Foods, Standard Brands, Chase and Sanborn, and if you test their coffee of the various grinds, you will find that one batch will throw off more gas than the other.

Another thing, the cubical contents of a pound is different. In other words, sometimes you will get a pound in X number of cubic inches, and an hour from then the grinding of apparently the same coffee will take a couple more cubic inches of packaging. So when you package coffee you've got a problem.

Today you've got two ways of packaging coffee. One is putting it in a paper bag, and the other is to put in a can. Of course, the way the situation is today, cans cost anywhere from 5½ cents to 6 cents apiece. That is apiece. A paper bag today costs all the way from 10, 11, or 12 dollars up to 16 or 17 dollars, depending on the quality of the lining they put inside.

9270 Q. For what quantity?

A. For one pound of coffee.

Q. No, you spoke of the cost of paper bags in dollars. Dollars for how many bags?

A. One thousand. In other words, a bag would cost at $15.00 a thousand, 1½ cents apiece, where cans cost $55.00 to $60.00 a thousand, or 5½ cents apiece.

The bag they are using today gives the coffee no protection. So if the wife goes in and buys a bag of paper coffee that has been sitting on that shelf, or has been in the bag, we'll say, for two or three weeks, she takes it home and opens it up and it has lost its aroma; it has lost its flavor. So you have a flat cup of coffee. That's why cans have been so popular, because they pour all the vacuum out, and by pulling all the oxygen it leaves room for the CO_2 that the coffee throws off.

Now, what I have done here is taken three films of material. I have taken on the inside a heavy Kraft and I have coated it on both sides with a lacquer, heat sealing moisture resistant lacquer on the inside. Then I have taken aluminum foil, and cellophane; I have printed the cellophane on the inside and laminated it to the foil so the printing here can't rub off. The printing is in between the cellophane and the foil. Then I built a machine, which I have been working on for about four or five years, to take this material from a roll and make the package; then
9271 put a pound of coffee in it and vibrate it, and seal the bag, and deliver it so all they have to have is a girl on the end that takes these bags as they come off at the rate of 34 or 35 a minute, and put them in a shipping case.

This bag of coffee here, I can put fresh coffee in there and put it on a grocery shelf and it will stand there for four weeks, and when they open it up it's got flavor and aroma. It is not as good as a can but it is the best package there is outside of a can, and I am selling it for 2.2 cents apiece, which is less than half of what a can costs.

9272 Q. And yet somewhat more than the paper bag?

A. Yes. Now, that bag can't be tight (illustrating), because if it were absolutely tight—here is where the valve is right in here. If you will open this (illustrating), you will see right there is where the CO_2 escapes. It doesn't escape through the wall. It escapes right through here, because there is the valve; we leave that open right there.

Q. When you put this package on the market, Mr. Martin, did it drive all the paper bags out of the market?

A. No.

Q. Just for the record would you tell us whether this is a transparent or non-transparent package?

A. That is a non-transparent package. There is no particular advantage—we do make a coffee bag of all cellophane but we print it solid and use a laminant that is colored, so that you can't see the coffee anyway. We make an opaque package out of it.

Q. Mr. Martin, I want to show you a frozen food package of Oven-Ready cherry pie. Will you tell us how you developed that package? Will you tell us what materials are in it and what your development was?

A. Well, here is the situation: When it was discovered by the bakers that they could take a pie and freeze it, put it in a deep freeze and freeze it solid, and they could keep that pie as
9273 long as they wanted to, and when the wife wanted a pie for dinner or supper, or whenever she wanted it, she would go out and get it out of the freezer.

Well, they can't wrap a cellophane pie; they have got to put it in something rigid, especially if sold out of a store and piled in a deep freeze with a lot of other things.

So I told the baker that he would sell a lot more packages if he would put a picture of that pie right on the package and make it as realistic as he could so that the housewife would know exactly what she was buying. Of course, the trouble is, most of them, they try to make the picture look better than the product. But that is the idea of promotional selling.

Q. What type of picture do you call that, Mr. Martin?

A. That is what we call process printing, and it is gravure. There is only one process that can be used in this type of printing, and that is gravure.

Q. In recent years has Shellmar sold a considerable amount of cellophane over printed wraps for frozen foods?

A. Well, we were the first people—when the frozen food industry started, I figured there was a terrific potential, and of course we sold the majority of all the frozen food packages.

Q. That is the over-wrap?

A. Over-wrap, in printed cellophane, with process printing gravure. But in the last three years we have lost practi-
9274 cally all of the business. In fact, we have got about one account left now that is still using cellophane because the wax paper came along and they process print the wax paper and use it and it costs about one-third of what the cellophane costs. So we have been losing accounts.

We haven't got much of an argument outside of the attractiveness of it. Of course, the cost is a big factor, and there has been quite a food in the frozen food industry to keep their costs down competitive to competitors' costs, and of course we have lost the business. But while we have lost that, we try to go and promote new business to take its place.

Q. Are you now promoting a sugar bag?

A. Yes, sir.

Q. Will you tell us what that is made of, what the promotion was, and what material it is designed to replace [handing sample to witness]?

A. My argument on sugar was this: People would say, "Why do you want to put sugar in a cellophane bag? Sugar is sugar." But when you go in a store to buy sugar, when your wife goes in a store to buy sugar, she goes over usually to a counter that has flour and salt and sugar. Now we try to make what we call an impulse sale. We try to have a woman go in a store and buy sugar when she doesn't intend to buy sugar when she goes in there. So we thought if we would make an attractive package and put the

9275 illustration of the product on the package such as we have done here——

Q. You have the picture of a cake on that bag?

A. A cake. We have a series—we have a cake, a pie, a shortcake, anything that looks appetizing, we put it on there. A woman comes along and she sees that and it stops her, she picks it up and puts it in her little cart and goes along. Otherwise unless she has sugar on her list, there is nothing to make her buy a bag of sugar the way it is packaged now with an old paper bag sewed across the top.

So we made tests on this and we found we sold three times as many packages of this as we did of the paper bag right aside of it.

It enables the grocer to put that sugar up on the shelf with the other things in a different category and sell three times as much sugar as he sold before.

Q. Have you been able to drive paper bags out of that market?

A. No. We probably will never drive paper bags out. It will always be there. But we do expect to get a certain percentage of the business in cellophane bags.

Q. Mr. Martin, from your experience as a converter, do you know of any product for which converted cellophane is used for which no other flexible packaging material is used?

A. Do I know any product that—will you ask me that again?

9276 Q. Do you know of any end use for your cellophane products for which no other flexible packaging material is used?

Mr. MINICUS. Objection. I think the word "end use" requires further definition, your Honor. The witness has just pointed out in this bag of sugar that the cellophane bag does a different function than the paper bag. It creates an impulse sale which the paper bag doesn't do.

Now, I think the use covers both on sugar but it isn't for the same purpose of effect.

Mr. MCGLOTHLIN. Your Honor, the purpose is to sell sugar. You can't get around that.

The COURT. I do not like the question in its present form.

Mr. MCGLOTHLIN. All right, sir.

The COURT. Try again.

By Mr. MCGLOTHLIN:

Q. Mr. Martin, you sell converted cellophane for the packaging of a number of different kinds of products, do you not?

A. Yes.

Q. Now, taking over your sales of cellophane for different kinds of products, is there any one of those products that to your knowledge is wrapped only in cellophane by all producers?

A. Not that I know of. I don't know of any product
9277 that is wrapped exclusively in cellophane.

Q. In your experience have you encountered a situation where a producer for a given product will use cellophane for a time and then change to another material?

A. Oh, yes, that is done every day.

The COURT. Where is your list?

The WITNESS. Here [handing paper to Court].

The COURT. Let's make this definite. Read that list off.

Mr. MINICUS. I didn't understand, your Honor, when the list was being read—does this show the percentages that Shellmar uses cellophane against all their products or is it the percentage of products for all the Shellmar cellophane?

Mr. MCGLOTHLIN. The testimony is clear. It is the output of the flexible packaging division, all materials.

The COURT. All materials.

Mr. MINICUS. If they had said here that a certain product, let's take candy, is ten per cent on this list, does that mean that 90 per cent of the candy is in other wrappers?

Mr. MCGLOTHLIN. No.

Mr. MINICUS. Well, that is not clear, your Honor.

Mr. MCGLOTHLIN. It is clear to everybody else, your Honor. Of 100 per cent of the output of the flexible packaging division of Shellmar, 10 per cent of that output went to candy.

The COURT. That is why there is glassine or cellophane
9278 or any of the other materials. That is how I understood the testimony.

Mr. MINICUS. Thank you.

By Mr. MCGLOTHLIN:

Q. Mr. Martin, I am going to read this series of end uses for which you sell flexible packaging materials, and will you tell me as to each one whether other materials than cellophane are used, other flexible packaging materials than cellophane are used, not by your company necessarily, but by producers. Baked goods?

A. Well, in baked goods you use cellophane, you use glassine, you use wax paper, you use parchment and you use foil.

Q. Bread.

A. Well, in bread the biggest product used for bread is wax paper, cellophane and wax paper.

Q. Glassine also?

A. Some glassine, yes. You take the transparent types of glassine. A lot of it is used.

Q. Candy?

A. Candy is mostly now glassine.

Q. Cereals?

A. Well, cereals is glassine and it is waxed glassine. Some of it is cellophane, but very little of it.

9279 Q. Cheese and dairy products?

A. Well, cheese starts with foil and then it goes from foil and they use cellophane. They use Saran, and now they are using polyethylene.

Q. And pliofilm?

A. In natural cheese, yes; they are using pliofilm in natural cheese.

Q. Chewing gum?

A. Well, chewing gum is foil and paper and cellophane and some sulphite sheets laminated together.

Q. Crackers and biscuits?

A. Crackers and biscuits, most of crackers and biscuits are wrapped in a waxed glassine, but some of it is wrapped in cellophane.

Q. Dried fruit?

A. Well, dried fruit uses pliofilm and cellophane and glassine and greaseproof liners for the cartons that they put the dried fruit in.

Q. Dried vegetables?

A. Well, dried vegetables are usually put in a laminated material so that no vapor—they want to keep it dry, so that is usually a laminated sheet, and that laminated sheet is usually composed of foil and pliofilm and paper, or foil and cellophane and paper; it depends on what combination you want to make and how

9280 much you have to protect it.

Q. Drugs and cosmetics?

A. Well, all types of flexible material are used in cosmetics.

Q. Fresh produce?

A. Well, fresh produce, you have got acetate and cellophane and pliofilm and polyethylene and regular glassine and parchment paper.

Q. Frozen foods?

A. Frozen foods is greaseproof and cellophane and it is usually put—at the present time it is put in a rigid carton, an over-wrap with a wax wrapper, a printed wax wrapper.

Q. Hosiery?

A. Hosiery uses glassine, and it uses cellophane, and it uses acetate and uses pliofilm, and some vinyls are being used and also some polyethylenes.

Q. Meats?

A. Well, meats use cellophane and greaseproof and parchment and acetate and pliofilm.

Q. Fish?

A. Fish is greaseproof or parchment or cellophane or foil.

Q. Oleomargarine?

A. Well, oleo has been all over the lot. They are changing it about every two weeks. Oleo started to be wrapped
9281 just like the old package of lard. It was a greaseproof with a carton around it. Then they started with a squeeze bag where you colored the oleo in the bag, and that was a combination vinyl sheet, and we put the berry right in it.

Q. That is, the coloring material in it?

A. Yes, and broke it, you see, and mixed it right in the bag. Then when the Government allowed the colored oleomargarine to be colored, that is, to let the people color it to imitate butter, well, then, of course, they went to putting it up in print—that is, quarter pound pieces; they started out wrapping each quarter pound in greaseproof or foil. Then they put the four quarter pounds in a box, in a carton, a waxcarton, with a die cut hole in it. Now they are eliminating the printed carton and some of them are using regular greaseproof wrappers around the quarter pounds and they are over-wrapping it in a transparent printed wrapper.

Q. Paste goods, such as spaghetti and noodles?

A. Well, that is paper and cellophane and pliofilm and vinyl; most every kind of a flexible material is used.

Q. Popcorn and potato chips?

A. The biggest part of potato chips is waxed glassine. Now, there are some potato chip manufacturers who are using printed cellophane, but the bulk of all the potato chips today are sold in a waxed glassine bag.

Q. Do you encounter foil in potato chips?

9282 A. Some, not so much, but there is some foil used.

Q. Rice?

A. Well, rice is put up in cartons, and it is put up in paper bags, and it is put up in cellophane bags.

Q. Textiles?

A. Well, textiles go all the way from paper to pliofilm, cellophane, acetate, and polyethylene.

Q. Tobacco?

A. Well, tobacco is mostly foil, but you have got glassine—we make tobacco pouches out of a combination of glassine and cellophane. We make it out of a combination of glassine and pliofilm, and we make some with foil, and with laminated foil and acetate.

Q. That is the paper pouch like in Edgeworth?

A. Yes, we make the Edgeworth pouches.

Mr. McGLOTHIN. That is the list, your Honor.

By Mr. McGLOTHIN:

Q. Mr. Martin, when you succeed in convincing a customer to change a product from some other flexible packaging material to

cellophane, how long does it take him after you sell him the idea of doing it to make the change?

A. Well, it all depends on his product. If you are dealing with a little operator that packs his material by hand, it is very quick.

9283 In other words, I can go in after the artist has created the design and he has accepted it, I can have this man's wrapper or bag or whatever he puts his product in, in thirty to sixty days. However, if the manufacturer is a large manufacturer and uses mechanical means of packing, many times you have to change his packaging equipment. In other words, the machine he is using, for instance, to pack a paper bag can't be used to pack a cellophane or an acetate or a pliofilm bag.

Mr. MINICUS. Objection to that question and answer, your Honor. The question is based upon the assumption that Mr. Martin's company in every case is the one that convinces the user to change from one product to another. There is evidence already in the case, particularly on the depositions, that many of these companies, the big ones mostly, decide themselves, through their own experimental laboratories, that they want to make the change and they tell the converters what it is they want to use.

Mr. MCGLOTHLIN. No such assumption.

The COURT. It seems to me that goes to the credibility of the witness' testimony. That hasn't anything to do with the admissibility of this evidence. Objection overruled. Proceed.

By Mr. MCGLOTHLIN:

Q. You gave us thirty days, I believe, for the smaller fellow after the decision to change. What would you say is the outer range of change-over in time?

9284 A. Well, if a packaging machinery is involved?

Q. Yes.

A. Well, for instance, on this coffee I just showed you—now, I have been working on that with this particular customer for three years. Now, about a month ago he adopted it as his standard package. Well, he has got to have eight machines to do his packing, and it will take about a year and a half to get those machines in. Now, we put them in one at a time.

Q. Is that longer than the usual time needed for a change-over?

A. Yes, it is. Sugar is the same thing. We have got to build packaging machinery to pack that sugar, so it will take about a year before we can actually get on the market with that sugar, outside of making a small market test.

Q. Let's say such a thing as a frozen food over-wrap—if a man using a wax paper over-wrap decides to change to cellophane, how long will it take him to change over?

A. Thirty days, if he hasn't got a great big inventory that he wants to get rid of. Some people, if they think it is important

enough, will destroy their inventory. But if he has no inventory we could change him over in thirty days.

Q. Now, have you experienced times when some of your customers who were using cellophane stopped its use and went to another material?

9285 A. Oh, yes, they are doing that all the time. I just told you on the frozen food, we had all that business and almost lost that overnight.

Q. When a customer decides to stop using cellophane and to go to another material for the same product, how long does it take him to change over?

A. The same amount of time. Sometimes it seems as if they can go into another product a lot faster than ours, but it should take around the same time.

Q. Thirty days?

A. Yes.

Q. Do you produce chewing gum wrappers?

A. Yes.

Q. For what company?

A. We produce them for Wrigley and for Beech-Nut.

Q. Is cellophane used in one of those wrappers or both of them?

A. Well, cellophane is used in Wrigley's and has been used for the last—we have been printing the Wrigley, 75 per cent of the Wrigley wrappers, for the last ten or twelve years.

On Beech-Nut it is different. Now we print cellophane for Beech-Nut, and they changed and they went to a foil, a printed foil. Now they are starting to go back to the cellophane.

9286 At first they used plain cellophane, then they had their own presses. Well, how we happened to get in the Beech-Nut business, they ordered a great big seven-color press, which was supposed to cost about fifty or sixty thousand dollars to do their own printing. They got the press half-built, the manufacturer got stuck, and he couldn't finish it, and Beech-Nut came to us and said, "If you will take the press and finish it up, we will let you do the printing." I took the press, finished it up—threw half of it away and rebuilt it, and have been doing that business in cellophane. But now they took it away from us and put it in foil, but we are gradually going and trying to sell them back on the cellophane, and we are succeeding to a certain extent.

Q. Now, of the flexible packages that you make, Mr. Martin, to what extent are they consumer unit size packages as opposed to bulk size or wholesale size?

A. Most all of it is consumer size; we furnish very little material for bulk packaging.

Q. Have you received sales assistance of any sort from du Pont, and if so, will you tell us what it was?

A. Yes. For instance, certain concrete examples, if we go out into a bag promotion, we want to promote bags, the use of bags in a certain industry, we ask du Pont to give us all the assistance they will give us because naturally the more assistance we can get, it saves us money and helps us get the product on the market
9287 faster. So we ask their sales department, and they have a package promotional department, to cooperate with our package promotional department, which they do.

Q. Has your company always had a package promotional department?

A. No. When we were little we could not afford it. I was the package promotional department.

Q. Can you tell us in your judgment in what period of your company's growth was the sales assistance from du Pont of the greatest importance to you?

A. When we were small.

Q. Why was that?

A. Because when we were small we needed assistance. We had a lot of resistance in getting cellophane to be accepted by certain users of wrapping materials, and when we were small we just didn't have the volume and enough profit to afford to go out and have promotional men go out and devote 100 per cent of their time to promoting packages. After we got larger and we had a larger volume and our profit was enough, we set up a sales promotional department for packaging.

9288 Q. Have you ever received market surveys from Dupont?

A. Yes.

Q. Have they been of any use to you?

A. Yes.

Q. Have Dupont salesmen ever made calls with you to a prospect?

A. Very seldom.

Q. How about your salesmen?

A. Well, once in a while they make a call. See, of course we fight with Dupont all the time because we want more help from them. The more help we can get from them, we figure it is something we are getting for nothing. But they have two divisions. They have a direct sales and they have a converter sales division. Their direct sales, their men on the field are interested in selling a tonnage of cellophane in their area. A lot of times we find two salesmen fighting each other because if we get the business, then that man doesn't get the business, so he don't get credit for it by Dupont, but he gets credit for it from us. But as a rule, we get along pretty well; at least, we try to.

Q. Have you received any sort of technical assistance from Dupont?

A. Yes, we have.

Q. Will you tell us what that was?

9289 A. Here's the thing. Of course, they have a technical division. In certain departments, like solvent recovery, or in slitting, slitting cellophane and the handling of cellophane, naturally they have made a study of it, that department has made a study of it, and we figure they know more than we do about it. So we go to them, and if we want to slit a better roll, we go to them and ask them to cooperate with us and show us how to do better slitting.

Most of that took place twenty years ago or fifteen years ago. There is very little we go to Dupont with now on technical assistance unless it is, for instance, solvent recovery.

We throw away half a million dollars worth of solvent in the air every year. Dupont recovers that solvent when they make their cellophane. I don't know anything about solvent recovery but I hire engineers to put a system in, and I don't get the recovery. So I go to them and say, "Will you loan me a couple of your stop solvent recovery engineers to help me get this thing going?" which they do.

The COURT. Do they charge you for it?

The WITNESS. Yes. Sometimes they do and sometimes they don't. I say that if you send a man down there and he spends a week, I am willing to pay for it; I am willing to pay for his time. Of course, I am tickled to death; what I want is

9290 technical knowledge. I can hire all kinds of fellows but they don't accomplish anything.

By Mr. MCGLOTHLIN:

Q. Turning to your salesmen, how many salesmen do you have for your flexible packaging division?

A. We have between forty and fifty.

Q. Do those salesmen concentrate on a particular material in the sense that one sells cellophane, one acetate, one glassine?

A. No. Most all of them sell the whole line. We have two or three what we call specialty men. We just hired a man to concentrate on polyethylene, but as a rule they sell the complete packaging line.

Q. Do you have any salesmen concentrating on cellophane alone?

A. No.

Q. When did you first purchase cellophane from Sylvania, Mr. Martin?

A. We have purchased cellophane from Sylvania from the minute they started to make cellophane that we could use.

Q. Did you make a purchase back in the early thirties?

A. I don't know what year, but I know this. I know when Dr. Wallach came over here and they set up this Sylvania plant, I went to them immediately to try to see if I could get film from them.

Q. Did you get a shipment from them?

9291 A. Yes, sir. I got a shipment from them. I probably gave them one of the first orders they got from a converter.

Q. What was your experience with that shipment?

A. I couldn't run it on the machines. It was a different type of film. It was made different and it curled and the rolls weren't good; they didn't fit the machines and a lot of times I had to use it for different purposes. I couldn't run it on a long web machine, or I couldn't put it on a fast bag machine, or I had to fold it over and glue it, and things like that.

Q. What are the speeds of modern bag machines?

A. Cellophane bag machines today run all the way from 10,000 bags an hour to 22,000 bags an hour.

Q. Was there a time in the forties that you began buying substantial quantities of Sylvania film?

A. We got on a definite allocation with them sometime in the forties. I think it was around 1945 or something like that.

Q. Can you tell us approximately what the allocation was that you had from Sylvania?

A. We gave them about a million pounds a year, between a million and a million and a half pounds a year.

Q. In the period between your very early purchases from Sylvania of cellophane that you told us about, and the start of these purchases in 1945, did you purchase Sylvania cellophane at all during the period in between?

9292 A. Yes, we purchased a lot now and then, but the trouble was, in the first place, their material didn't run the same. Our ink formulas that we had set up, they wouldn't print the same, and we just couldn't use it. We couldn't mix it up with the other film. Our waste was too high.

You see, in our production we waste a million and a half pounds a year. We burn up in a bonfire, because there is no salvage to it after you print. You can't do anything with it. Of course, a difference of two or three per cent waste in our business is the difference between our profit and loss.

So we kept trying it and trying it and they kept shipping it in, but we couldn't use it as economically as we could the Dupont film. But we have been in constant contact with them all the time. We let their men come right in there and watch the film run, to try to correct it.

Q. After you began buying on the order of a million or a mil-

lion and a half pounds a year in 1945, have you been continuing to purchase in that order?

A. Yes. Lots of times they didn't make deliveries. In other words, they are supposed to ship us so much a month. There were times when they were three months behind in shipping it to us.

Q. From 1945 on have you used Sylvania film for general purposes throughout your plant?

A. We have never been able to use it for general purposes.
9293 We have always had to put it in certain places, on certain types of machines, and in certain types of conversion. We could never throw it in for all-over conversion.

Q. What types of machine would you say are those that you don't put the Sylvania film on?

A. Take as far as printing in gravure; if we have anything over three colors, process work, we don't put Sylvania film on.

Q. Why not?

A. Simply because it is not as stable. We may start a Sylvania web through the press; one side of the roll is maybe a little softer than the other, or it stretches or it shrinks. There are never two shipments alike, and the coated surface of the cellophane isn't uniform. We may run along and have a good looking job, and in 200 feet either the blue don't print or the red don't print or the white don't print because it don't take to the surface, because the surface varies.

Q. Would you say that a converter's requirements as to quality are higher, lower, or the same as, say, a hand wrapper, or somebody like that?

A. Would I say what?

Q. Does a converter need higher quality of film than a man using, let's say, a semi-automatic bag machine?

A. No. Converters must have the best film that the manufacturers can make, because he's got to run it on fast ma-
9294 chines, and usually they cut the middle out of the roll and give it to the converter, which gives you a good even roll all the way across.

If you had what we call a sloppy roll on one side—that is, a loose roll—and tight on the other, and you are printing a registered job through a press, you can't hold a register on the loose side because you got more length on one side than you have on the other. So if you are off in the printing a sixteenth of an inch, you haven't got any printing. That is waste.

Q. Is register where two colors are supposed to meet together but not overlap?

A. Yes. It all depends. We have the line printing and process printing. That pie you looked at here, that is process printing. If that was off a thirty-second of an inch, it would have the appear-

This is dated November 13, 1934. Is that almost five years after the memorandum of February 11 and 12, 1930?

A. Yes.

Q. Now, this probably, sir, is a reference to a matter that you discussed early in the cross-examination. You will note here, in case your recollection does not carry back, that your entire discussion with Mr. Bernheim is concerned with certain islands off the Southern Coast of the United States, primarily, I believe, Cuba, and that there is a dispute about whether these islands fall in the American sector or in the British sector. You recall that to be generally the substance of it?

A. Yes, I think that is correct.

Q. Now, Mr. Carpenter, will you kindly turn to page 2 of this letter and observe the last six lines of the first full paragraph, that is, the large paragraph on the page, and tell me kindly if I quote correctly therefrom:

"A further reference to the minutes of the meeting
9232 of the various viscose sheet producers of February 11 and 12, 1930, in which the territory excluded apparently because of its being considered du Pont territory is referred to as Canada, Mexico, United States, Cuba and generally speaking all countries of North America down to the Panama Canal."

Is that a correct quotation?

A. That is correct.

Q. Then does not this letter from yourself establish that five years after the meetings of the 11th and 12th of February, 1930, du Pont still had recourse to that memorandum——

A. Still had what?

Q. Recourse to that memorandum of that meeting as authority for definition of the territory in which it was enabled to operate?

A. Well, a reference is certainly made to that memorandum. My recollection is here that we were endeavoring to find various references in which the French had indicated a disposition to consider Cuba as our territory, and that was apparently a reference made in that connection, yes.

Q. And to establish your position you cited the memorandum of February 11 and 12, 1930, rather than Defendant's Exhibit 1001?

A. Well, we cited that instead of the exhibit, surely.

Q. Do you recall any incidents, Mr. Carpenter, in or
9233 about the years 1929 or '30 in which Wolff was negotiating in this country with certain American companies?

A. In which who was——

Q. Wolff and Company of Germany was negotiating in the United States with certain American companies to jointly erect a plant for the manufacture of cellophane?

A. Well, at this moment I don't recall it, no.

Mr. MINICUS. At this time I would like to have marked for identification a letter of June 25, 1929 from Mr. Sparre to Mr. Yerkes, and the number could best be Government Exhibit 1484.

(The letter from Mr. Sparre to Mr. Yerkes dated June 25, 1929 was marked "Government's Exhibit No. 1484 for Identification".)

By Mr. MINICUS:

Q. Mr. Carpenter, I show you Government Exhibit 1484 and ask you to note that although this is a letter from Mr. Sparre to Mr. Yerkes, it has been marked for your attention up in the upper lefthand corner; is that not true (handing Government Exhibit 1484 to witness)?

A. That is correct.

Q. You will note, sir, that half-way through paragraph 1 is the statement by Mr. Sparre, "I have also learned today that plans are underway to build another transparent sheeting plant in
9234 this country. Work in this connection is underway by Wolff and Company of Germany. I understand that they first negotiated with the Western Cartridge Company but that Wolff and Company broke off the negotiations because they heard that the du Pont Company had some connection with the Western Cartridge Company. Since then I am told that Wolff and Company are arranging to organize a company for the purpose with other American interests."

Is that a correct reading from that section?

A. Yes.

Q. Are you aware, sir, of any connection then existing between the Western Cartridge Company and du Pont?

A. Well, I recall this connection, that the Olin interests I understand to be owners of the Western Cartridge Company, and we and the Olin interests both had a holding in the Equitable Powder Company, a small powder company. As I recall offhand, that is the only connection I can think of.

Q. Equitable Powder Company was a subsidiary of what corporation, sir, or who were the owners of Equitable Powder Company?

A. The Olin group.

Q. What share of the stock did the Olin group then own?

A. I think they owned 51 per cent.

Q. And what proportionate share of the stock did du Pont own?

A. We owned the balance.

9235 Q. May I perhaps——

A. I may be a little confused about those percentages. I haven't seen them in a good long while.

Q. Perhaps I can refresh your recollection, but please correct me if you think I am in error. Wasn't it true that du Pont had approximately 49 per cent and the Olin Corporation had about 49 percent and members of the Olin family had about 2 per cent?

A. Well, that may be true. I don't believe I ever knew that to be a fact, but I have heard that, sir.

Q. In 1929 do you recall, sir, any projects in common with the Olin interests other than this common ownership in the Equitable Corporation?

A. Any joint activities, you mean?

Q. Yes, sir, other than that in Equitable.

A. Well, I can't think of them offhand.

Q. Then is it not probable that the connection between Western Cartridge Company and the du Pont Company, which is mentioned in Government Exhibit 1484 for identification existed in the common ownership of Equitable by du Pont and Olin?

Mr. GESELL. Objection. He is asking for a mere surmise, as to what Mr. So and So thought about what Mr. So and So said.

Mr. MINICUS. I have established that we have a

9236 du Pont report here, your Honor, that says——

Mr. GESELL. He can't ask him to surmise, your Honor.

Mr. MINICUS. Are you through, sir?

Mr. GESELL. I don't know.

Mr. MINICUS. That says that because of some connection between du Pont and Western Cartridge, Wolff and Company from Germany gave up their negotiations with Western Cartridge to manufacture a cellophane plant in the United States.

The COURT. Well, it seems to me you ought to ask the witness if he knows why.

Mr. MINICUS. The witness said that he did not know why at that time.

The COURT. That is the end of it.

Mr. MINICUS. We are trying to establish any other possibility.

The COURT. If he doesn't know, he doesn't know.

Mr. MINICUS. The connection?

The COURT. If he doesn't know the reason why Wolff withdrew, he doesn't know, and I am not interested in his surmise. I want the fact, if you can establish it.

Mr. Minicus. I have established, sir, that there was no other connection that the witness had any recollection of between Western Cartridge Company and du Pont.

9237 The Court. The ruling stands.

By Mr. Minicus:

Q. You do not know, Mr. Carpenter, that the connection spoken of in that letter is the connection that du Pont and the Olins had jointly in Equitable Powder, is that correct?

A. No, I don't know whether that is what they are talking about.

Q. But you don't know of any other connection?

A. No, I don't.

Q. What is the nature of the Equitable Powder Company, Mr. Carpenter?

A. The manufacture of explosives.

Q. Is it an operating company itself or does it hold stock in other operating companies?

A. It holds stock in a number of companies, but it is also, or at least it used to be an operating company itself.

Q. Does it also own other operating companies in a subsidiary capacity rather than an investment capacity?

A. I am inclined to think it has, but I haven't seen their statement in so long I don't know.

Q. Are you familiar with the Columbia Powder Company?

A. I have heard of it.

Q. Do you know what product they manufacture?

A. No —— I think it is black powder.

Q. Texas Powder Company?

9238 A. I have a very hazy recollection of all those, Mr. Minicus, but I can't identify them.

Q. The Egyptian Powder Company?

A. Yes, I have heard of them.

Q. You know that one?

A. Yes.

Q. How about the United States Powder Company, Mr. Carpenter?

A. I am hazy about that one.

Q. Do you know whether du Pont does business with the United States Powder Company?

A. No, I don't.

Q. Well, what products does the Equitable Powder Company manufacture?

A. It is my recollection they were manufacturers of black powder.

Q. Do they manufacture any dynamite?

A. I don't know.

Q. You don't know whether or not the Columbia Powder Company, a subsidiary of Equitable, is devoted entirely to the manufacture of dynamite?

A. No.

Q. Do you know whether the Olin Company itself manufactures dynamite?

A. The Olin Company?

9239 Q. Yes, the Olin Industries, today.

A. Directly rather than through operating companies? I have never heard of them manufacturing explosives.

Q. You have never heard of Olin Company manufacturing high explosives?

A. I have always through of the Olin Company as purely a holding company. Now I am not sure whether you are making a distinction there between their subsidiaries or not.

Q. It is my information, Mr. Carpenter, that Olin itself today operates entirely through divisions very much in the way that the du Pont Company does, and many of these corporations have now become divisions that were formerly subsidiaries. You have no recollection of this?

A. No, I have not.

Q. Let's see if we can tie this thing down, Mr. Carpenter. Do you know whether the Olin Corporation or any of its subsidiaries formerly manufactured dynamite?

A. No.

Q. Do you know whether the Olin Corporation or any of its subsidiaries now or formerly have manufactured smokeless powder?

A. Yes, I think they did.

Q. Let's go back to 1920, if you will, sir, for a moment. In 1920 did du Pont manufacture and sell all of the following: black powder, dynamite and smokeless powder?

9240 A. Yes.

Q. Were they still manufacturing the same products in 1930?

A. Yes.

Q. And in 1950?

A. Yes.

Q. Does it follow then that du Pont and Olin have for a considerable period of years dating back perhaps to 1920 sold explosive powders in the United States market for these products?

A. Yes.

Q. And is it also a fact to your knowledge that the Equitable Powder Company has also sold black powder in these markets?

A. That is my understanding.

Q. But you don't know about dynamite, sir?

A. I am not sure about dynamite.

Q. Dynamite in distinction to black powder is designated very often as a high explosive?

A. That is right. I recall, Mr. Minicus, years ago that there was some discussion as to whether or not Equitable should go into the dynamite business. My recollection was that they had never gone into it but I may be mistaken.

Q. From time to time, Mr. Carpenter, have persons appointed by the du Pont Company sat as members of the
9241 Board of Directors of the Equitable Powder Company?

A. Very nominally.

Q. What do you mean by nominally, sir?

A. I mean that the relationship there was a very unusual one. They held directors' meetings and our representatives went out there, but the meetings were very perfunctory.

Q. But there have been du Pont representatives on the Equitable Board?

A. Yes, in years past.

Q. Now, throughout the period of time in which du Pont has owned 49 percent of the stock of the Equitable Powder Company has du Pont attempted to influence operations of the Equitable Powder Company or any of the explosive powder operations within the Olin interests?

A. No, sir, not to my knowledge.

Q. Do you recall whether or not the du Pont Company ever attempted to dissuade the Olins from entering the high explosives powder field?

A. I can't recall of any such incident.

Q. Did du Pont ever attempt to discourage the Olins from engaging in the manufacture and sale of smokeless powder?

A. I can recall of no such incident.

Q. In 1930, Mr. Carpenter, can you recall how many
9242 producers of smokeless powder were operating in the United States?

A. About three, I should think, at that time.

Q. Could you identify them, sir?

A. Well, there was the Western Powder and there was Hercules and du Pont.

Q. And Western Powder was an affiliate of the Olin interests?

A. Yes.

Q. In 1930 how many manufacturers of ammunition using smokeless powder were operating in the United States?

A. Well, I would guess about a half dozen.

Q. Could you identify them, sir?

A. Well, there would be Western Cartridge and Winchester, Remington, Peters and Federal. I can't recall whether there was another one or not.

Q. In 1930, Mr. Carpenter, which of those ammunition companies of the five that you have identified were operating independently of the smokeless powder manufacturers? In other words, let me rephrase it. Of the five ammunition manufacturers that you have identified, were any of them owned by a manufacturer of smokeless powder in 1930?

A. I am not perfectly clear about that dating, Mr. Minicus.

Q. Perhaps I can refresh your recollection, sir.

9243 Do you recall that in 1930 Western Cartridge Company, which was affiliated with the Olin group, was the only manufacturer of ammunition that was affiliated with a powder manufacturer?

A. I think that is true. I know that the situation changed sometime over the next few years, and just what the dating was, I am not clear.

Q. Can you recall how the situation had changed by 1933, Mr. Carpenter?

A. Well, again I am a little confused by the date, but I know that along there somewhere——

Q. May I——

Mr. GESELL. Let him finish his answer.

Mr. MINICUS. Certainly. I was just trying to expedite the matter.

By Mr. MINICUS:

Q. Would you like to finish, sir?

A. I would just like to say that the Olin group acquired Winchester and we acquired an interest in Remington. Whether or not it coincided with that date I don't know.

9244 Q. Did you not also at or about that time acquire Peters?

A. Yes. That was subsequently.

Q. About that time, of the smokeless powder manufacturers, Olin had acquired Western and Winchester, and du Pont had acquired Remington and Peters. That leaves only Federal of those we have designated. Do you know who owns Federal?

A. No.

Q. You have no idea of the ownership of Federal?

A. I do not know who owns Federal.

Q. As a result of this change in the smokeless powder and small arms ammunitions business, was the du Pont Company in 1933 considering various plans to organize the industry through the cooperative efforts of du Pont, Olin and Hercules?

A. I don't think I have a recollection of that.

Mr. MINICUS. Will you mark this document Government Exhibit 563 for Identification?

(Letter dated June 30, 1933, from Walter S. Carpenter to J. Thompson Brown was marked for identification as Government Exhibit No. 563.)

Q. This exhibit, Mr. Carpenter, which has just been marked for identification No. 563 is a letter dated June 30, 1933, from yourself to Mr. J. Thompson Brown. Will you please read that?

9245 A. Yes, Mr. Minicus, I have read it.

Q. Having read that letter and refreshed your recollection, do you recall now that in 1933 du Pont was considering various plans to organize the smokeless powder ammunition industry through the cooperative efforts of du Pont, Olin and Hercules?

A. I don't know whether you could call that that we were considering any very serious plans. The letter starts out by just a few rambling thoughts on the munition matter before leaving town. I was leaving town at that time. I don't recall whether this matter was ever followed up or not.

Q. Did you notice that on the second page of the letter it also says:

Whether under the new and industrial program it is conceivable that we could work out some form of partition of the total between du Pont and Hercules, I do not know. Perhaps this is worth exploring. Maybe it is not beyond the pale to consider endeavoring to bring about a consolidation of Hercules and Olin.

Mr. GESELL. I think he should have that letter in the hand of the witness before he asks him to answer that, your Honor.

Mr. MINICUS. That has only been marked for identification.

The COURT. Nevertheless, when you have a paper

9246 marked for identification and it is utilized with the witness, it is proper procedure to have the witness look at the paper and examine it.

Mr. MINICUS. The witness has just read the letter, your Honor, and we have only this one copy. I would have had to read that over his shoulder, and I thought it would be preferable not to do that.

Perhaps the witness can read the statement.

Mr. GESELL. That is not the way to get evidence into the record, your Honor. He can ask him a question about the letter. The letter is not in evidence.

Mr. MINICUS. I have asked a question and he didn't like the question I asked. Now I have asked the witness, is that the statement that appeared?

The WITNESS. Well now, I will have to go back and find out just where we are. What are you asking, whether or not you read the letter correctly?

Mr. MINICUS. Yes.

The WITNESS. As you read it, I noticed no difference from what I read.

Mr. MINICUS. That's all I wanted to know, Mr. Carpenter. Thank you very much. You have been very cooperative.

I have no further questions, your Honor.

The COURT. Any redirect examination, Mr. Gesell?

Mr. GESELL. Just two questions, your Honor.

9247 Redirect examination by Mr. GESELL.

Q. You said, Mr. Carpenter, that Mr. Gillet was the focal point of your relations with the French. Was he not for quite some time a director of du Pont?

A. Yes. He became a director of du Pont when we took over the minority interests.

Q. Has du Pont had, over the history of its ownership in Equitable Powder, any genuine participation in the management or conduct of the affairs of that company?

A. No. As a matter of fact, it has been kind of a joke with us, really.

Mr. GESELL. That's all.

The COURT. We will adjourn court until tomorrow morning at 10:00 o'clock.

(At this point the trial was adjourned until 10:00 o'clock a. m., Thursday, April 17, 1952.)

9248 THURSDAY, APRIL 17, 1952, TEN O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. May I take a moment, your Honor, about schedule?

I communicated with Dr. Reichel, in accordance with the discussion we had yesterday when the Court opened, and he can be here first thing Wednesday morning. I have requested him to appear for the completion of his cross-examination.

(Further discussion off the record.)

Mr. McGLOTHLIN. I call Mr. Bert Martin.

BERT W. MARTIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Mr. McGLOTHLIN. If your Honor please, Mr. Martin is president of the Shellmar Products Corporation. Shellmar is one of the earliest and now one of the leading cellophane converters and also converters of other flexible packaging materials, particularly noted for high quality printing and promotional work.

Mr. Martin will testify as to how he came to be a converter, his part in the conversion of the cellophane, the relations of his company with du Pont, and the competition between various packaging materials from the converters' standpoint.

9249 This is addressed to the Government's contentions that du Pont in some manner aggrandized and engrossed the giants of the converting industry, and protected them from competition, thereby suppressing Sylvania.

Direct examination by Mr. McGLOTHLIN:

Q. Give us your full name, please?

A. Bert William Martin.

Q. What is your position?

A. I am president of the Shellmar Products Corporation.

Q. When were you born?

A. October 12, 1897.

Q. Is Shellmar Products Corporation a successor to an earlier company by the name of Shellmar?

A. Yes. We originally incorporated in the State of Delaware under the name of Shellmar Products Company, and in 1945 we changed that to the Shellmar Products Corporation.

Q. That was a merger with a business of another sort, was it?

A. It was another packaging business, only in rigid packaging rather than flexible packaging.

Q. Under what name in Shellmar Products Corporation do you carry on the business that was formerly done by Shellmar Products Company? What is the name of that division?

A. It is called the Shellmar-Flexible Division.

Q. Mr. Martin, when did you start? Were you the
9250 founder of Shellmar?

A. Yes.

Q. When was it founded, I mean the business?

A. We were incorporated in 1923, and we actually started business—well, we were delayed in getting the new equipment completed, but we actually started in business in 1924.

Q. What had you done prior to the time you started Shellmar?

A. I left school when I was 15 years old. I graduated from grade school when I was 13, and went to high school a year, but I come from a pretty large family and my father had a pretty hard time taking care of all the kids, so I had to go to work.

I left school at 15 and started in by peddling milk and I helped plumbers and worked in paper mills, because I come from a paper mill town.

Then when I was 16 I went into the printing business. That is, I was a printer's devil. I started in sweeping the floor and doing all the dirty work that a printer's devil has to do.

9251 Q. That was shortly after World War I?

A. No, that was before World War I. I was sixteen years old, and I stayed in the business and progressed up to the superintendent of this particular plant that I started to sweep the floor in when I was nineteen years old.

Then I joined the Navy in World War I and in between times I did a little boxing to help out. I was in the ring for six or seven years. My father always figured that he wanted to make a professional fighter out of me because in the first place he thought no man was good unless he could protect himself, and secondly he thought there was a lot of money in it.

Q. Mr. Martin, when you started the business in 1923, where did you get the capital to start it?

A. Well, you see, when I joined the Navy, I had no money; I had given all my money home and of course my father used to give me about 25 cents a week to spend, so when I joined the Navy I had no money, and it happened when I joined I never got paid because I kept going from one station to the other and my records never caught up with me. So when I got out of the Navy I had never received any pay, so I used to live off of borrowings from one fellow and another fellow, but I got married when I was in the Navy and I borrowed $35 to get married on, and incidentally I had to pay that back to my father. I got married in
9252 Waukegan, Illinois. I got a couple of hours leave from Great Lakes Naval Station, went up there, got married and left.

Q. How much capital did you have when you started the company?

A. I personally didn't have any, but I talked my father into loaning me all he had, which was about $2200.

Q. Now, what was the first business of Shellmar? What were you printing?

A. Well, I started as a job printer, and in the various operations of job printing I had an old press that I printed some candy wrappers, glassine candy wrappers on, for a local paper jobber, and I got the idea that if I could—of course, at that time the largest number of colors that could be printed were two. So I figured if I could develop a press or have a press built that would print more than two colors, I would have something the other fellow didn't have and could build up a specialized business in the candy manufacturing field.

Q. What material were you printing on?

A. Glassine.

Q. Were you able to develop or have developed such a press?

A. Well, I found a fellow in Menasha, Wisconsin, who told me he could build a press that would print five colors in one operation from a roll.

Well, that had never been done before. So I made
9253 a contract with him to build this press for $50,000.

Now, the first company that I started, the job printing company that I started, was not called the Shellmar Company; it

was called the Badger Printing Company, and I was in that one year and three months, and I had two other men that we each put in $2200, and I owned a third and the other two fellows owned two-thirds. But in the course of the year and three months that I was in it, one of the men sold out to me, so I owned two-thirds and the other fellow owned one-third.

Q. Can you tell us about when you got your first press that would do this multi-color printing on glassine?

A. Well, I got it in the latter part of '23, part of it, and I got the rest of it in '24, but it took me about a year and a half or two years after I had the press all set up and paid my money, which cost me $80,000 instead of $50,000—I owed everybody and had no money myself, and I was still borrowing money to live on, and it took me two years to get this press going. So that would be in the latter part of '24 that the press was actually running.

Q. Now, from '24, let's say, until around '27, what was your business? Did you continue printing candy wraps?

A. Yes. We started in candy wraps, and after I got the one press going then we ordered another press, so we had two presses.

Of course I was the salesman and the bookkeeper—I 9254 had no help. I did it all myself. I used to sleep at the plant and eat at the plant and just live as close to the boards as I could. But we had the two presses and we just got them going well and then we had a fire and the whole thing burned down, building, presses and all.

Q. Where was your plant when you had this fire?

A. In Milwaukee, Wisconsin.

Q. Prior to the fire had you started printing any cellophane?

A. Yes. We printed some cellophane prior to the fire.

Q. Now, do you remember the trade name of the first cellophane you printed?

A. Well, the first cellophane that we printed with a trade name was Fenestra.

Q. In what form was that, sheets or rolls?

A. That was in sheet form. We would take it and attach it to a web of paper, and then we would run it through the press and print it.

Q. When did you first start printing any cellophane made by Dupont?

A. Well, I think the first roll that we printed from Dupont—it was a peculiar thing—in Milwaukee, after the fire, of course—well, just before the fire we had exhausted all our money and I

got some additional money by getting Mr. Pabst, Mr. Gustav Pabst, the brewery man, he had a son, and I talked the
9255 son into coming in with us and I immediately made him treasurer of the company. He took care of the finances, that is, the necessary finances, and he was acquainted with one of the Dupont boys. One of the Dupont boys was working up in a powder plant up in Wisconsin some place and evidently the two had gone to school together. So they got to talking about cellophane, and Dupont were just starting to make it, and he said he would try to get a roll and bring it back with him. He used to go back home every two or three weeks.

So he came back and brought a roll with him. Where he got it, I don't know, but I presume that it was made in the Buffalo plant, in their Buffalo plant, and that was the first roll of cellophane that we ever printed.

Q. That was then around '25 or '26, along in that period?

A. Well, I think it was in the latter part of '24 because the fire was in '25.

Q. Now, would you say that it was fair to characterize your company at the time that you started printing cellophane as a giant of the industry?

A. We were no giant of any industry. The fact of the matter is, we just didn't have any money and it was a question of whether we were going to stay in business or whether we were going to be forced out of business.

The COURT. How did you frame that question?

9256 Mr. MCGLOTHLIN. I asked whether at the time he started printing cellophane it was a fair description of his company to call it a giant of the industry, as it has been characterized. I didn't put the last, as it has been characterized.

By Mr. MCGLOTHLIN:

Q. Now, after the fire I believe you moved your plant to Chicago for a while, did you not?

A. Well, after the fire the insurance company told us if there was anything we could get out of the salvage of those machines that were burned, we could have it. Of course we had no alternative. We didn't have any money to buy any more machines, so we cleaned the thing up and rented a little room and rebuilt the machines the best we could and decided as long as we had to start over, the better place would be in Chicago rather than Milwaukee.

So we rented some space and moved this machine to Chicago, moved to Chicago and started operating there.

Q. Where are your plants located today, Mr. Martin, that work on flexible packaging materials?

A. Well, in the flexible division the main plant is in Mt. Vernon, Ohio. Then we have a plant in Southgate, California, which is right next to Los Angeles. They are the two main plants. We have one in Zanesville, Ohio. That constitutes the flexible end of it.

9257 Then we have foreign plants. We have one in Mexico City, one in Medellin, Colombia, and one in Sao Paulo, Brazil.

Q. Going back to the time when you were starting to print cellophane, would you say that the gross sales of your company at that time were greater or less than a million dollars a year?

A. When we started to print cellophane? They were less than a million dollars a year.

Q. Can you tell us what the net sales of Shellmar Products Corporation, the whole corporation, were in 1951?

A. Yes.

Q. What were they?

A. $43 million dollars.

Q. How much of that was represented by the flexible packaging division?

A. About $28 million dollars.

Q. And how much of the flexible wrapping division was represented by cellophane?

A. About fifty per cent.

Q. Going back a minute to the early thirties, Mr. Martin, are you familiar with a company known as Dobeckmun?

A. Yes.

Q. Do you know approximately when that company began operations?

9258 A. Well, it began operations when we were in Chicago, which I imagine would be in the very late twenties or the very early thirties.

9259 Q. What was the size of Dobeckman when it started out?

A. There was no size. They built a little machine that made a small tube to go on a cigar.

Q. You had one machine?

A. Yes. They built a machine and they figured that they could wrap it, putting cellophane on cigars could be built as a business, and they started with one machine. They formed a company, and called it Dobeckmun. There were three people: one was Dolan, another Becker, another Munson.

Q. Was it a giant in the flexible packaging converting field at that time?

Mr. MINICUS. Objection, your Honor. There has been no establishment of what these questions are leading up to at this time.

You notice the dates are running between 1925 and 1930, when the industry itself was just getting started.

The COURT. Yes. What is the emphasis on this giant business?

Mr. MCGLOTHLIN. The Government has asserted repeatedly that one of the means by which du Pont suppressed Sylvania was by taking to itself the giant companies, the leaders in the converting field.

The COURT. Was that the phrase selected by the Government?

Mr. MCGLOTHLIN. Yes, sir.

The COURT. Well then, you will have to accept it.

9260 Mr. MINICUS. I have no recollection of it. I would like to have a citation of any place where I said giant. I said the leaders in the field, probably.

Mr. MCGLOTHLIN. I think this is Mr. Minicus I am quoting:

"These promotional converters whom we maintain were bound to the defendant by an exclusive agreement, were the giants of the industry."

The COURT. Those are your words, Mr. Minicus, and you are stuck with them.

Mr. MINICUS. What page?

Mr. MCGLOTHLIN. 1697.

The COURT. Proceed, Mr. McGlothlin.

Mr. MINICUS. I might submit, your Honor——

The COURT. Do you want to take that back?

Mr. MINICUS. No, sir, but there has been no definition here of the size of the industry. It may be that only Mr. Martin's company and Dobeckman were in it at that time.

The COURT. You utilize your skill as an advocate on cross-examination to bring those points out. Let Mr. McGlothlin get along.

(The pending question was read by the reporter as follows:

"Question: Was it a giant in the flexible packaging converting field at that time?"

Mr. MCGLOTHLIN. That refers to Dobeckmun.

9261 The WITNESS. No, they were not giants. Dolan started about the same as I did. He was a truck driver and happened to get this idea, and started out with one little machine which probably didn't cost over $500.

By Mr. MCGLOTHLIN:

Q. What materials does Shellmar convert today, Mr. Martin?

A. We convert practically all flexible materials that are used for packaging.

Q. Let me read a list and you tell me if you do not convert them: Cellophane, pliofilm, vinyl film, Saran, polyethylene, cellulose acetate, aluminum foil, glassine, sulphite paper, Kraft paper,

greaseproof paper, vegetable parchment, tissue, and coated book paper.

Do you convert all of those?

A. We convert all of them, in addition to cloth.

Q. Mr. Martin, I want to show you some samples of what I think are Shellmar's converted products and have you tell us what they are. This, I believe, is a ham wrap. Can you tell us what that is made of?

A. That is made out of cellophane.

Q. Here is a package called Little Crow Pancake Mix. What is that?

A. That is polyethylene.

9262 Q. Here is one called Slumberdry Crib Sheet. What is that?

A. That is glassine.

Q. Here is Wilson's Natural Cheddar Cheese. What is that?

A. That is pliofilm.

Q. Here is an Oscar Mayer Frankfurter Wrap, I believe, is that correct?

A. Yes.

Q. What is that?

A. That is pliofilm.

Q. Here is a seedless raisin package. What is that?

A. That is foil and paper.

Q. Here is a Dan-dee Pack Quality Tomatoes. What is that?

A. That is acetate.

Q. Here is the Bunny Esmond Infant's Towel. What is that?

A. That is acetate.

Q. And here is McCrary Stockings. What is that?

A. That is a combination of paper and acetate, with printing in the middle.

Q. Are all those products of the Shellmar Products Corporation?

A. Yes, sir.

The COURT. Off the record.

(Discussion off the record.)

Mr. MINICUS. If I may have a minute, your Honor, in fairness to the Government I would like to point out one

9263 thing, that at the time that expression "giants of the industry" was used, I was discussing Exhibit 5047, which is dated April 28, 1941.

The COURT. Well now, we have to start with the birth of the giants, don't we?

Mr. MINICUS. There is no indication yet when they developed.

The COURT. I think that will be brought out.

ance of you looking through a foggy glass. It would look as though your glasses were dirty. That is the appearance of it.

Q. During the period since you have been purchasing a million or more pounds a year from Sylvania, have you been getting any sales or technical assistance from Sylvania?

A. We get very little sales or technical assistance from Sylvania. They don't have a setup for that. They don't have a package promotional department. They may have one man they may
9295 call a package promotional man. I don't think we have ever had any packaging assistance from Sylvania, and I don't think we have ever had any technical assistance from Sylvania, because they don't have the setup for it.

Q. I believe you said that during the years between your first purchase when Sylvania just started in 1945, you were continually in touch with Sylvania, is that right?

A. Yes. We have been in touch with Sylvania ever since they started in business.

Q. Were you offered discounts from Sylvania?

A. Yes.

Q. Were those discounts different or the same as the discounts you were getting from Dupont?

A. I could always get just as good a discount from Sylvania as I could from Dupont.

Q. Was there a time, Mr. Martin, when you had a requirements contract with Dupont?

A. Yes.

Q. Was that requirements contract in existence in 1945?

A. I don't know. I don't know the dates. We had a requirements contact at one time. I don't know when it stopped or when it started.

Q. Let me put it to you this way. Did the requirements contract with Dupont stop you from buying from Sylvania?

A. No, sir. We kept on trying Sylvania's stuff all the time,
and I have always figured that I wanted to have more than
9296 source of supply for that particular type of material.

Mr. MINICUS. In light of the answer, I have an objection, your Honor. I think we should have a definition of what a requirements contract is.

The COURT. All right, let's find out.

The WITNESS. A requirements contract, as I understand it, is this. You have a contract where you agree to buy Dupont material, and you are called a promotional converter. You are put in the converter classification. You have a requirements contract in which they try to have you forecast for the year how many pounds you are going to use, and you are supposed to buy it from Dupont. That's the way I understand it.

By Mr. McGLOTHLIN:

Q. But despite that, you did buy from Sylvania?

A. We kept on buying from anybody that made a transparent film.

Q. Including Sylvania?

A. Yes. But I'll say this. Regardless of any requirements contract, I told Dupont if I bought from Sylvania: I told them right out I was going to buy it from Sylvania, and if they didn't want to give me a requirements contract, it was okay with me.

Q. When Dupont knew you were buying from Sylvania then, did Dupont cut your converter discount from Dupont?

9297 A. No, sir.

Q. Did they cut down your allocation?

A. No, sir. I don't think they did. Of course, I don't know. How can I tell? Maybe they could have given me more and didn't give it to me. But as far as I am concerned, I had an allocation and I got that.

Q. Did they cut down on the sales service they were giving you?

A. No, sir.

Q. Did they punish you in any way?

A. Not that I know of. I might have been punished that I don't know anything about.

Q. There was a time in 1944, was there not, when you had some relationship with a company called Blake, Moffat & Towne?

A. Yes, sir.

Q. What is Blake, Moffat & Towne?

A. They are jobbers on the West Coast.

Q. Were they distributors for the cellophane?

A. They were distributors for Sylvania cellophane.

Q. What was your arrangement with Blake, Moffat & Towne?

A. We were to furnish them with all of—that is, bags, in a converted material, that a jobber ordinarily distributes.

Q. Was there any discussion or arrangement as to what cellophane you would use to make material for Blake, Moffat & Towne?

9298 A. Yes.

Q. What was that?

A. Blake, Moffat & Towne said we should use all Sylvania material when we supplied their stock, whatever it was.

Q. Did you use Sylvania material?

A. We were supposed to. Once in a while we put in Dupont. It all depended. If we had Dupont, it run better; we used Dupont. They didn't know the difference.

Q. Did you inform Dupont that you were making bags of Sylvania film for B. M. T.?

A. Yes.

Q. About how long did that arrangement with B. M. T. run?

A. I don't know; I guess a couple of years. I don't know how long.

Q. In your experience as a converter, Mr. Martin, have you ever observed a time when the number of converters was not growing?

A. Was not growing?

Q. Yes.

A. It grew too fast. There are new converters. Of course, to begin with, it grew slowly. New ones kept coming in the field. Now there is one coming in every day. Now we've got 200 competitors. But when we started you could count them on your hand.

Q. It grew slowly and then more rapidly?

9299 A. Yes, sir.

Q. The Government has charged that Dupont discouraged the entry into business of converters, and the purpose was to protect its customers from vigorous competition by other converters who might come into the field. That is on page 1697 of the transcript. Do you feel you have been protected from vigorous competition from other converters?

A. I wish I was. I certainly have had many arguments with Dupont about it, but it never seemed to do any good. They have sent men into our place, they have seen the machines, seen exactly how we done it, and they go around to all the wax manufacturers and everybody else, and the first thing I know they are all in the cellophane business. So certainly they didn't protect us as far as competition is concerned.

Q. Do you compete with other converters?

A. Sure.

Q. Will you tell us if there are times when you are able to develop an account and another converter takes it away from you, and how that works?

A. Sure. I have worked on accounts sometimes for two or three years, and I go in and finally convince the buyer that he should use our particular wrapper, and I get the first order. I make all the plates and I get the whole thing. Usually the first order is a small one, and I may get the second one.

9300 Then along comes a converter behind me and he hasn't done a bit of development work at all, hasn't spent a dime, but he comes in and says, "I see you are using this wrapper so and so. I can give you that. If you will buy it from me you will save so much. I will give to you for so much less a pound, or so much less a thousand."

That goes on all the time. That is what you call a non-promotional converter. He is just a fellow that comes along and cashes in on all the promotional work you do.

Q. Do you have any expense involved in your promotional work?

A. I should say we do.

Q. Will you give us some idea of the expense?

A. In promotional work, in the first place, you have to make a survey; then you have to study the man's product. You've got to know whether it has to be protected, what type of protection it must have. Then you've got art work. Lots of times you've got to go so far as to make a set of plates, make a wrapper, wrap the package, make a display, and try to sell it to him.

I have worked sometimes a year and a half or two years to sell a company on the idea of using our particular package. One of the biggest users in cellophane it took me three years to get him to use our particular package. But now every con-
9301 verter is in there and they come in after I have done all the work, cut my price and tried to get the business. Some of them give them the business, some of them don't.

Q. Have you ever known a time when Dupont ever tried to stabilize this price war between the converters?

A. Stabilize it? I think they helped to increase it, as far as I am concerned. They always told us that our prices were too high, our printing prices were too high, and that was holding back the use of material. But they would never do anything. You couldn't even talk to them about getting the boys together. I would like to get them together and get the prices straightened out.

Q. Has Dupont ever tried to assert any control of the area in which you sell?

A. No, sir.

Q. Has it ever tried to dictate the price at which you will sell any of your products?

A. Only to say we should sell it cheaper.

Q. All products?

A. Yes.

Q. Have you used the Dupont label?

A. Yes.

Q. When you were making bags for Blake, Moffat & Towne, of Sylvania film, were you also making bags for other customers out of Dupont film?

A. Yes, sir.

9302 Q. Did you use the Dupont label on the cartons of Dupont bags?

A. I don't think we ever put a Dupont label on Blake, Moffat & Towne's cartons. I know we have had a lot of Dupont labels on Sylvania film that went around to different customers because sometimes you would have a few boxes here and a few boxes there.

Well, you certainly weren't going to monkey around to look for another label to stick on that box. Lots of times they were mixed up. Part of it was Sylvania. Part of it was Dupont.

Q. You continued to use the Dupont label while you were making bags of Sylvania film?

A. Yes, sir.

Q. Do you report your end uses of your converted products to Dupont?

A. Yes, sir, we did. I don't know whether we do now or not, but we did.

Q. What was the purpose of that?

A. It saved us a lot of money, for this reason. If we would furnish the end use, and we could get the converters' end use, they could show us how we were going in industries. We may see what progress we were making in fresh foods, or see what progress we were making in the baking industry. We could find out what progress was being made, whether we were losing ground or gaining ground, as far as transparent wrapping is
9303 concerned.

Q. Did you get such information back from Dupont?

A. Yes, we did.

Q. During the period that you have been buying Sylvania film in quantity, that is, since 1945, have you reported end uses to Sylvania?

A. No.

Q. Have they ever asked you for end uses?

A. No, I don't think they did.

Q. Mr. Martin, what would you say a package today has to be in order to be a successful package?

A. It's got to protect the product, it's got to be good looking, and it's got to be cheap.

Q. Would you say that non-cellophane packages meet those requirements?

A. Well, they must meet them because there are more packages that aren't cellophane than that are cellophane, so they certainly must meet the requirements.

Q. Do cellophane packages also meet those requirements?

A. In some instances, yes, but it takes a lot more selling and a different type of selling to sell a cellophane package than it does a paper package.

Q. You spoke of impulse buying, I believe, in connection with your sugar bag?

A. Yes.

9304 Q. Is impulse buying something that is confined to a cellophane package?

A. No, it is confined to any package. It don't matter what material you use. Impulse buying is something we are all fighting for. Every promotional flexible converter is fighting to get a package that will cause sales to be made on impulse. Of course, maybe you can call it something else. We have called it that for years and I suppose that is as good a name as any. It causes a woman to take hold of it and pick it up and buy it when she didn't go in there to buy that at all.

Q. Would you say the packages you convert of glassine have caused impulse buying?

A. We have a lot of packages that have caused impulse buying that are made of glassine. We have a lot of them made of foil. We have them in different papers and laminations, and in cellophane.

Q. Would you say that cellophane in and of itself promotes impulse buying more than any other material?

A. I don't know. I think it does. I think cellophane properly printed and decorated makes a very fine looking package. I think if you forget the protective qualities of it and look at it just from the looks and attractiveness of it, I think that a cellophane converted package is a very good looking package, and a lot of times make an impulse sale.

Q. Would you say that your printing contributes 9305 to that factor in the impulse attitude?

A. I have always said—Dupont doesn't agree with me—that the printing has more to do with it than the cellophane. I'll leave that up to anybody. You take that pie wrapper and you wrap it up in plain cellophane and hold it up, and then hold it up with that pie on it. Which will sell? Anybody can see that.

Q. During your experience with cellophane, has the quality of it improved, the stock that you received?

A. Yes.

Q. Would you tell us how it has improved? In what qualities?

A. When we first got cellophane, we weren't able to run it fast because it was not of even gauge, and the coating wasn't uniform, very poor rolls and it was brittle. I remember the time when a lot of accounts would use cellophane in the summertime and quit using it in the wintertime because it would break in the wintertime. Now we are running presses all the way from 500 to 700 or 800 feet a minute, where we used to run them 50 or 60 or 70 feet a minute. You couldn't do that unless they had made a lot of improvement in the cellophane.

Q. I believe you told us, or at least the record shows, that the price of cellophane has come down considerably from the time you started using it.

A. Yes, sir.

9306 Q. What effect did those price reductions have on your business?

A. Every time the price went down it enlarged our market. When we started using cellophane we were paying close to two dollars a pound for it. Of course, you had to really do some high-pressure selling to sell it. Every time they reduced it five or ten cents a pound, it made it easier to get it on to a different product.

Five or ten cents a pound means an awful lot in the cost of packaging when it takes six or seven pounds per thousand to package whatever you might be wrapping. But it enlarges our market.

If they could sell cellophane for twenty cents a pound, we would sell more today than we are selling now—much more.

Q. In enlarging your market by lower price, was that enlargement principally from displacement of other materials?

A. Some, yes. Some we replaced paper, some we replaced glassine, some foil, some were brand new packages. You take dehydrated food. That is not very old, and a package was developed for that.

Dry yeast: It used to be that when you made bread you would go to the grocery store and get what they called baker's yeast. It was soft and wrapped in a little piece of foil. Now you buy it as dry yeast. That is a new product so that is

9307 a new package.

Q. Have you experienced in Dupont cellophane an increase in the number of types of cellophane available to you over the years?

A. The number of types of cellophane has increased over the number of years.

Q. Has the increase in number of types had any effect on your business?

A. Absolutely, because here's what happened. When they first started to make cellophane, they started with a PT cellophane, which was an uncoated cellophane. There was no protection to it at all. You printed on it and you had transparency.

Now, of course, you coat the cellophane. Then you found you wouldn't wrap greasy products in a certain coating; so you made a special coating for potato chips and a special coating for something else. Take butter. We wrapped butter once in coated cellophane, years ago, when they first started to coat it. All the coating came off on the butter and I had to buy ten carloads of butter one time. I tried to get Dupont to pay for it; they paid for half of it.

Then they went to work and improved that film, so now we can wrap butter and the coating doesn't come off on the butter. That has been repeated in many, many instances.

MICRO
TRADE
CARD
MARK ®

5617

MATTHEW BENDER & COMPANY
MB

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Q. In your experience have there been improvements in wax paper over your life?

9308 A. Certainly. You've got wax paper which, when you look at a sheet that is manufactured today as against something that was manufactured ten or twenty years ago, there is a terrific improvement. It is shinier, it is glossier.

It used to be that wax paper was sticky, but now it is nice and hard and has a glossy surface and looks clean and sparkling.

Q. Has printing on waxpaper developed?

A. Yes, sir.

Q. Can you now get process printing and such pictures on wax paper?

A. Yes, sir.

Q. Is that a recent development?

A. It is a process development. Yes, it is comparatively recent.

Q. Have there been improvements in glassine?

A. Yes, there has been a great improvement.

Q. Can you tell us what those are, what those improvements are?

A. When we first bought glassine—that is made out of spruce pulp, some out of hemlock—I used to get glassine that you couldn't wrap a candy bar in. We would print it, ship it to a customer, and when he turned the ends over they would break and the two ends of the candy would stick right out. Or it would become brittle, and it was not uniform.

9309 Today they've got a plasticizer in there; they've got a coating on it. They will make you a transparent glassine, or semi-transparent glassine. They've got different grades of glassine today that they didn't use to have.

Q. You have been working with pliofilm for some time, have you not?

A. Yes, sir.

Q. Has it improved?

A. Yes, sir. They make different grades of pliofilm. When they started they had one grade. It has been about the same as cellophane or glassine. They have kept improving it, because if it didn't work here they tried to correct it so it would work.

Q. Have you had the same experience with polyethylene?

A. Not so much. Polyethylene is pretty new, and practically all of the flake, the majority of the flake is allocated to the Government today, and until it is loosened up so that you can really go out and do a job on it as far as packaging is concerned, I can't say there has been very much progress made as far as the quality of the sheet is concerned.

Q. Have you made efforts to sell cellophane for bread?

A. Yes.

Q. Have you sold some?

A. Yes.

9310 Q. When you go out to sell your cellophane for bread, what are the principal disadvantages you run into? What are the sales obstacles?

A. Number 1 is price, the difference in cost between using a wax wrapper and cellophane. You see, when I sell cellophane I sell printed cellophane. They use plain cellophane with a band around it, a paper band around it, but I tried to sell the printed cellophane. Of course, that is the most expensive wrapper.

My argument to the baker is that all his specialty loaves should be put in cellophane, but of course it increases his cost immediately and unless he can show an increased sale he is not going to use it.

Q. Do you ever run into objections to the fact that the bread can be seen?

A. I claim they should see the bread, but a lot of the bakers don't want the bread to be seen too closely because some days the bake is a little browner than others. If they happen to burn a little bit, and they've got a transparent wrapper on it, of course the woman immediately sees it. Or if they don't bake it enough, if they've got a weak, pale looking loaf of bread, they will be seen. So they've got to be a little more particular with their loaf and wrap it in a transparent wrapper. If they put it in waxpaper they cover it up, so the woman doesn't know it. It is too late then.

9311 Q. Would you tell us how the sales of converted cellophane in the nut field have gone? Will you tell us what the trend has been in wrapping nuts in recent years?

A. When they started to put out retail packages of peanuts and shelled pecans and different types of nuts, which you have seen on these little cards in the stores, they tried glassine but they all wanted to use a transparent wrap. So they tried cellophane. There have been an awful lot of nuts put in cellophane, but there has been a lot of trouble.

Salty nuts don't work so well in cellophane. Then you have got breakage. You can imagine what happens if they ship these cards with bags of nuts all over and the bag starts breaking. Most of the big selling nuts in the small retail packages are put up in glassine. They have used a lot of pliofilm but they have had trouble with that.

The Goodyear people are trying hard to improve that. But cellophane becomes brittle if it loses its moisture, and if that card hangs out in a room where there is no humidity, it becomes brittle and the bag breaks and the nuts go all over the floor.

Q. In your experience are the customers for cellophane a sep-

arate class, distinct from the customers for other flexible packaging materials?

A. Oh, no. Most customers buy all types of material. It depends what your customer is. We sell to Wrigley. They do nothing but make gum and they have one standard wrapper
9312 for the gum.

But take a bakery. You go in to the National Biscuit Company, where they use every possible type of flexible wrapping material that is made, and yet they are one of the biggest buyers of our products in the country.

Q. You told us that Wrigley used, I believe, an opaque cellophane?

A. Yes. Wrigley's package has got about four things in it. The people that buy the wrapper don't realize it. But if you open up a Wrigley package of gum, you will see a foil, a nice interior clean foil wrapper. You've got foil and you've got paper and you've got cellophane and you've got wax. They are all laminated together in that package, and then it is wrapped and sealed on the ends, and a tear tape is put on the end to tear it off.

Q. I believe you told us that another gum manufacturer went from cellophane to foil?

A. Beechnut went from paper to cellophane, back to foil.

Q. Will you tell us whether, in your experience, Mr. Martin, cellophane competes with wax paper and glassine?

Mr. MINICUS. Objection. There is no definition of what this witness has in mind when he uses the word "competes" in this case. The word "compete" and "competition" is a legal conclusion. It is the thing that we are attempting to decide here. I think we need a more factual breakdown of the concept.

9313 Mr. MCGLOTHLIN. He can ask him on cross-examination what he means by compete, if your Honor please. It is a fairly common word.

The COURT. Haven't you really gone into this question by the detail of whether bread is wrapped in cellophane and wax paper and glassine and the other materials?

9314 Mr. MCGLOTHLIN. I hoped I had, your Honor.

The COURT. I am going to sustain the objection.

Mr. MCGLOTHLIN. Your witness.

The COURT. We will take a recess now of ten minutes.

(At this point a brief recess was taken.)

Cross-examination by Mr. RENNINGER:

Q. Mr. Martin, you were talking this morning about the various wrappers that are used on various types of products for various industries, like the bread industry, the cookie and cracker industry, the frozen food industry, and various other industries of that

nature. What in the last analysis determines what is the wrapper that will be used to wrap any particular product of that nature?

A. Well, there are two things; there are two outstanding things that determine that. Of course, one is the cost of it—usually you wind up with the cost of the wrapper. Then of course there is the attractiveness of it, and then the question of whether the particular type of wrapper can be applied mechanically.

Q. Speaking of cost, taking bread, if cost is the determining factor, then wax paper would be used, is that not true

A: Well, if cost is the determining factor in the particular baker's mind, he will use wax paper, yes.

9315 Q. And say a baker, if he wants a very high appealing wrapper, what would he probably use?

A. Well, I just got through with a baker last week that I have been working to sell cellophane, and I did succeed in selling him cellophane and put the shipment in there and he put his bread out and in ten days his sales went down; he has lost sales.

Well, of course, that was very serious because I had 10,000 pounds of stock in there that I just shipped in. He said he wouldn't use it any more. I went down and said, "Why won't you use it?" He said, "Here are my figures: I put in cellophane and my sales went off; and I put it back in wax wrappers and the sales went up to where they belong." That is a pretty hard thing to explain. I had got through telling him his sales would increase, and that is why he bought it. Now he wants me to take the rest back.

Q. Isn't that usually the case, when bread is changed from wax paper to cellophane, the sales increase?

A. Well, as far as I am concerned; of course, that is what I have been preaching ever since I have been printing cellophane, that the sales would increase. It isn't always the case. Now, in this particular instance it wasn't the case at all.

Q. Now, let us take, say, the wrapping of a cake. What is the determining feature as to the type of wrapper
9316 that would be used on a cake?

A. Well, there are two determining factors with a cake. A cake is a luxury item, and of course there are two things you have to do with a cake. If you don't protect that cake, if you don't wrap the cake and protect it, you have to take the cake off the shelf in at least two days, because it will dry out, and you want the person to see the cake.

Now, if the cake is a highly decorated cake, that is, with a nice big frosting, colored frosting or cocoanut or something of that kind, naturally the baker wants the customer to see that cake.

Now, he may put that in a box with a window in it, that is, he may cut a hole in the top of the box and set the cake in so they

can see through and see the frosting on the cake. That window is usually acetate. The reason it is acetate is because acetate stays smoother than cellophane. Cellophane will cockle usually in a window. So in window cartons they usually use acetate, and some of them will use cellophane when they wrap it all around.

Now, on cakes—that is, I am talking about large cakes—it is pretty hard to use an all-cellophane wrapper.

In little cup cakes, where they wrap them by machine and they sell two little cup cakes, they are wrapped both in glassine and in cellophane.

9317 Q. In other words, then, the wrapper used depends in the last analysis upon the end use?

A. Well, it depends on whether the man wants the product protected—whether he puts more importance in the protection than he does on the visibility and if he can afford to use it. A lot of them won't use it because they say they can use a glassine wrapper cheaper. Naturally I have been trying to sell a transparent wrapper because I would rather sell a transparent wrapper than a glassine.

Q. Why is that?

A. Because I get a bigger sale. In other words, if I sell a transparent wrapper in cellophane, I get three to four times as much in a sale as I do if I sell a glassine wrapper.

Q. You mean profit to yourself?

A. Well, percent of profit. If I am running the business on a 15 per cent gross on so many sales, I would much rather sell a product—if I can go in and make a call and have to spend two hours to make a call, I would rather come out with a $5,000 order than I would with a $1,000 order.

Q. Mr. Martin, is there any difference in the wrapping of a sugar-coated doughnut and a plain doughnut?

A. Any difference?

Q. Yes, sir.

9318 A. Oh, I don't know as there is any difference in wrapping it, no. If you use a transparent wrapper to wrap a sugar-coated doughnut, the only trouble there is many times the sugar brushes off on the transparent wrapper and makes soft of a mussy-looking wrapper.

Q. Could cellulose acetate be used on the wrapping of a plain doughnut?

A. Well, it is usually used in the form of a window. You won't find many doughnuts that are completely wrapped in acetate or completely wrapped in cellophane. You usually find the doughnut put in a tray, where the top has a window attached to the box. And that usually is acetate.

Q. Take potato chips, for instance, Mr. Martin. I believe you stated that they are wrapped in glassine and cellophane and foil, is that correct?

A. That is correct.

Q. Now, why would potato chips be wrapped in glassine?

A. Well, they refer to glassine as a greaseproof paper. Another thing, glassine is what we call a translucent sheet. There are a lot of potato chip manufacturers who work on the theory that light has a tendency to cause the oil on the potato chip to become rancid. Now, there are a lot of potato chip men who will not put cellophane on because it has the direct light; the chip coming in contact with the direct light causes the oil to become rancid;
9319 so they would rather use a translucent sheet. They could use paper because paper will absorb the grease and will become all spotty. So they usually use a glassine or a waxed glassine because it is grease resistant, and potato chips are fried in grease.

Q. Could he use a wax paper?

A. Yes.

Q. Can wax paper be made into bags?

A. Yes, lots of them.

Q. The usual reason, though, that glassine is used as a wrapper for potato chips, is it not, is because of the economy over cellophane?

A. Well, in many instances it is cheaper than cellophane. Now, they can buy a bag cheaper than glassine, but it is a grease resistant paper and it is translucent. You can see through it, but you cannot see through it clearly, and it also resists the grease.

Q. In other words, that is the function of the wrapper and not the product that is the important consideration in that case?

Mr. McGLOTHLIN. I object, unless he defines the function of the product and not the function of the wrapper. I don't know what he is talking about, your Honor.

(The last question was read by the reporter.)

The COURT. Will you try again?

Mr. RENNINGER. If your Honor please, he was describing why they would use glassine as a wrapper on potato
9320 chips because of the grease resistance and various other characteristics of that nature.

The COURT. Now, what is it you are trying to ascertain?

Mr. RENNINGER. Whether it is not that the function the wrapper is to serve that determines what is used on the product.

The COURT. I think that is simply stated.

The WITNESS. Well, that has part. I don't think that is the hundred per cent reason why they use the glassine. They use it for two reasons. They use it because it is a good wrapper on chips

and they use it because it is cheaper than a transparent wrapper. There are two reasons why they use it.

By Mr. RENNINGER:

Q. And in the last analysis what is used depends upon the manufacturer of the potato chips?

A. Yes, sir.

Q. Now, cellophane, why is that used on potato chips?

A. Well, I try to argue with the potato chip manufacturer that I can make a more attractive wrapper with cellophane. I think with potato chips, we try to make a sale of potato chips by the people looking at the chips, and I try to tell them that it will give them as much protection as glassine or more, and in addition, it will allow the purchaser to see what he is buying.

9321 Q. In other words, it is the transparency and the eye-appeal of the cellophane, is that it?

A. Yes. It is to sell more chips, so that the woman will pick up the bag of chips where she wouldn't pick it up if she couldn't see it.

Q. As to foil, why would foil be used for wrapping potato chips?

A. For two reasons, mostly for protection—you understand when you say foil, it is a foil mounted; there is always a liner to foil, that is, you have a wax liner on the inside, so the wax comes in contact with the chips, the foil absolutely keeps out all the light and protects the oil on the potato chip, and you can make a good looking wrapper out of it but you can't show the product unless you actually print "chips" on the foil.

Q. In other words, then, whatever wrapper is used it is the desire of the buyer, the customer, that makes the market, is that true?

Mr. MCGLOTHIN. I object unless he defines market.

Mr. RENNINGER. Well, if we are talking about potato chips, I would presume it would be the potato chip market.

Mr. MCGLOTHIN. All right, it is the desire of the buyer that makes the potato chip market. That is the question as I understand it.

Mr. RENNINGER. It would apply to any market, your Honor.

9322 The WITNESS. The potato chip market—when you talk about the potato chip market, it is highly competitive. There are a lot of potato chip manufacturers, and every potato chip manufacturer tries to make a good chip and he tries to outdo his competitor as far as packaging is concerned.

Now, some potato chip manufacturers feel that the protection of the chip by putting foil on it is worth more to them than putting cello[illegible]ne. Now, you may line up a half dozen potato chip

manufacturers and you will have a half dozen different ideas of what he should use as far as packaging his chips is concerned.

Q. Does not the potato chip manufacturer wrap his product by what he considers to be the buyer preference?

A. Well, they all do that. Anybody that puts out a product tries to wrap it to please the buyer, because the buyer is the one who keeps him in business.

Q. I believe you stated, Mr. Martin, that your purchases of cellophane in 1951 were diminishing, is that correct?

A. Well, no, they were not diminishing. The percentage to our entire business was diminishing, but not the tonnage. In other words, we are buying more cellophane in pounds, but the percentage to our entire sales is reducing.

Q. In other words, you are buying more cellophane, and you bought more cellophane in 1951 than in 1950?

A. Well, I haven't got the exact figures, but I think we did, yes.

9323 Q. Would you say that you have bought more cellophane in 1950 than you did in 1949?

A. I think so. I think it has increased every year because our sales have increased every year considerably.

Q. Mr. Martin, could you give me the percentage of your purchases of these other flexible packaging materials?

A. Yes, I can give you the dollar—I can't give you the percentage, but you can figure it out for yourself. I can give you the dollars we spent if you would like to have it.

Q. Yes. Can you do that?

A. Yes, I have it right here. I anticipated you were going to ask me that.

I bought $16,000,000 worth of cellophane from du Pont in 1951.

I bought $1,127,000 worth of pliofilm.

I bought $7,710,000 worth of foil.

I bought practically $140,000 worth of glassine paper.

I bought $1,581,000 worth of polyethylene.

I bought $566,000 worth of vinyls.

I bought $376,000 worth of miscellaneous flexibles, that is, papers and different types of things for lamination, and I bought $181,000 worth of acetate.

Q. I think you said the cellophane was $15,000,000 or $16,000,000?

A. $16,000,000 worth of cellophane. Now, I can tell

9324 you exactly how much I bought of cellophane and from whom I bought it, if you would like to have it.

Q. Yes, I think it would be interesting.

A. I bought $13,000,000 from du Pont, $18,036,000 worth from du Pont. I bought $2,008,000 worth from Sylvania. I bought

$221,000 worth from Olin. And I bought $715,000 worth from customers—that is, we couldn't get enough cellophane so we bought it from customers who had some extra.

Q. Mr. Martin, I believe you stated that you first purchased cellophane from du Pont around 1926 or '28, was it?

A. No. I think we bought some in the latter part of '24.

Q. When did you first really begin to buy cellophane in any appreciable quantity?

A. Oh, I think it was in '27 or '28 or '29, right in there.

Q. Why did you decide to become a printer of cellophane, Mr. Martin?

A. Well, I'll tell you the reason I did is because cellophane was the hardest thing there was to print at that time. Everybody could print paper. Everybody could print glassine. Everybody could print different flexible materials, but very few of them knew how to print cellophane. And I had special machines that I had built and developed special things, and I thought I had something the other fellow didn't have and I thought I could make
9325 more progress if I concentrated on transparent material than in the regular paper printing like thousands of others do.

Q. You felt that there was a market for printed cellophane?

A. I thought if it was properly engineered and properly developed and enough hard work put behind it, I thought we could build up a big business in that particular, in the flexible wrapping field.

Q. And you were very successful, were you not?

A. I wouldn't say I was very successful. It looks awful easy now, but if you had gone through the history of it, it wouldn't have been so easy. There were a lot of pretty dark moments in between.

Q. Mr. Martin, Defendant's Exhibit No. 449, which is already in evidence, which is a form letter from O. F. Benz, sales manager, to all salesmen, discusses the Milwaukee Printing Company. I presume that was your prior name, is that correct?

A. No, sir. They are one of our oldest competitors.

Q. In your purchases of cellophane from du Pont, Mr. Martin, do you remember what discount you received from du Pont in the very early days?

A. Well, I know we received a discount. I don't know how much. But it has been changed so many times, it would be pretty hard to remember it unless I had the dates and the figures right in front of me.

9326 Q. In the early days it was a quantity discount, was it not?

A. In the early days the one who bought the most got the

best discount, and then after we got up and we were buying the most, they changed it, so that the fellow who bought one thousand pounds got just as much as I did buying a million pounds.

Q. Under this quantity discount arrangement the more cellophane that you purchased from du Pont the greater the discount would be that you would receive, is that true?

A. Yes, sir.

Q. Did this not have a tendency for you to channel all your cellophane purchases to du Pont?

A. I didn't have any choice in the matter. They were the only people I could buy it from at that time.

Q. This quantity discount extended to 1938, did it not?

A. Yes. I don't know how long it extended, but while the quantity discount was on, I couldn't buy it from anybody else. I tried to buy it because I could get a discount from Sylvania when they started but I couldn't use their material, so I had to buy the most of it from du Pont. I kept on trying to use the Sylvania and kept urging them to improve their product so I could use it.

Q. What years was this, Mr. Martin?

A. Well, I don't know. I would have to look up the records. You must know when Sylvania started to sell 9327 cellophane.

Q. Yes.

A. That is when it first was.

Q. When they first started to sell?

A. Yes, sir.

Q. Did you use Sylvania cellophane after that for the next five or ten years?

A. Yes, sir, we used it, tried to use it, and kept on trying to use it, but not in any quantities because every time I would buy it and try to use it, my costs would go up, and I saw this and talked to Sylvania just as often as I did du Pont, and I knew them right from the beginning, used to go to their office, sit down, talk the whole thing over with them, show them where I thought they were wrong, asked them to send engineers down to watch it run, asked them if they couldn't improve it.

Q. As to the quantity discount, it acted as an incentive for any converter, of course, to build up his volume as high as possible, is that not true?

A. Well, if you are in business and you are trying to build your business, you are going to get all the business you can get whether you have a converter discount or not. Certainly it was a factor. Naturally we tried to make our business as large as we could.

Q. I think you stated that you were opposed to this charge

9328 from a quantity discount provision to a straight discount, is that true?

A. Yes, sir.

Q. Why, Mr. Martin?

A. Well, put yourself in my place. Supposing that you built up a business and you were the largest in the industry, and you were buying more cellophane than anybody and you were getting a quantity discount, the more you bought the bigger your discount. Supposing they come out and said, "Now, look, we can't do that anymore. We are going to give this fellow over here, even though he only buys a thousand pounds, just as big a discount as we do you. He does no promotion or anything else, hasn't helped to build the business up, but he is going to enjoy exactly the same kind of a price you are going to get." As far as I am concerned, I fought it.

The COURT. We will take our recess now. Recess until 2:00 o'clock.

(At this point a recess was taken until 2:00 o'clock p. m. the same day.)

9329 TWO O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

BERT W. MARTIN (Resumed).

Cross-examination (Cont.) by Mr. RENNINGER:

Q. Mr. Martin, at the end of the morning session we were discussing the quantity discount provision in the agreement that Shellmar had with du Pont relative to its purchases of cellophane. Do you remember what the amount of that discount was?

A. I don't remember exactly, no. I know there was at one time a maximum of 10 per cent.

Q. That was a quantity discount; was it not?

A. Well, if you bought 250,000 pounds, you got so much discount. If you bought 500,000 pounds, you got so much discount. I mean, it was divided in certain quantities. After you got over a certain quantity you went into a different discount figure.

Q. Was it not true that the highest discount that you could get under the quantity discount provision was three per cent?

A. No, I don't think so. I think it was higher than that.

9330 Q. Do you know, when you became a promotional converter, what the quantity discount was?

A. Well, first they gave us a quantity discount—that is, a discount depending on how much you bought—and then that was changed and I think there was a period in there where we got a certain discount for being a promotional—that is, for promoting new packages. I think we got a credit on that. I forget exactly what the figures were.

Q. But you objected when the change was made from the quantity discount to a straight flat discount, is that right?

A. Yes, sir.

Q. Mr. Martin, perhaps this document will refresh your recollection.

Mr. RENNINGER. I would like to have this document marked Government Exhibit #5564 for identification.

(Letter dated January 26, 1940 from Bert W. Martin to du Pont company, was marked Government Exhibit #5564 for identification.)

Q. Mr. Martin, this purports to be a letter from yourself to du Pont, dated January 26, 1940. Will you tell me if this is your signature?

A. Yes sir, that is my signature.

Q. Would you please read that letter, and perhaps that
9331 will refresh your recollection as to the discount provisions.

A. Do you want me to read it out loud?

Q. No sir.

A. All right.

Q. This letter is dated January 26, 1940, is it not?

A. Yes sir.

Q. The third paragraph reads: You are as familiar as I am with your previous arrangement whereby a converter received a certain per cent of credit depending upon the amount of volume of cellophane which he consumed. This, of course, acted as an incentive for the converter to build this volume as high as possible, and many times we were able to retain business even though our prices were governed by competition, and showed more operating profit. Under your present arrangement this, of course, is not possible. It also enabled us to carry on promotional work in order to realize a greater business.

What did you mean by that, Mr. Martin?

A. I simply meant, as I stated before, that when they changed it to a flat discount, it took away the quantity discount and it cost us money. We were actually losing a rebate from du Pont.

Q. Were you not receiving more under the promotional converter agreement, which was a straight flat discount, than you had received before under a quantity discount
9332 provision?

A. No. The most we received was on a quantity discount. That was the biggest percentage. The best deal we ever had from du Pont is when we were working under a quantity discount: the more we bought the bigger discount we got.

Q. You got more than 7½ per cent discount?

A. I don't know how it figured, but each year, as we went along, our sales increased and it gave us an advantage. If we were using

a million pounds of cellophane and the other fellow was using 250,000 pounds of cellophane, we had a distinct advantage because we had more rebate to work on; thereby we could go out and promote and do things, and had more money to work with.

I haven't figured it out just exactly how much we got, but I do know this, that we would much prefer to have a quantity discount than we would a flat discount.

Q. You mean it meant more to you in reference to your competitors?

A. It put is in a better competitive position. It gave us more money to go out and work on sales than it did the other fellow. But when they put us on the same basis, then we had no advantage, as far as that was concerned.

9333 Q. The next paragraph: "Your change in policy whereby you extended to all converters the discount of 7½ per cent with an allowance of 50 per cent of advertising and promotional expense providing it did not exceed 2½ per cent of our total purchases, cost the promotional converter considerable money, inasmuch as the 7½ per cent extended to the converter not only was passed on to the customer, but it caused a general decline, an unstabilized price in the industry where the actual discount passed on to the consumer as converted cellophane amounted to all the way from 10 per cent to 15 per cent. This means that the prices at which converted material was sold for in 1939 ranged in discount over previous years from 10 per cent to 15 per cent."

What do you mean by that statement, Mr. Martin?

A. Well, you see what happened was this: they were giving the consumer discount and they were giving the converter discount, and I don't remember, but I think they changed the converter's discount to a flat discount and still retained the quantity discount with the user, the user who bought everything from du Pont, and then the big question was, the catch in this deal, as far as we were concerned, they put this little phrase where they say we allow a 7½ per cent flat and then they would give us 50 per cent of our advertising if it didn't exceed 2½ per cent of our total pur-
9334 chases. That was the ceiling that was put on, that was the joker.

Then the question was, who was to determine what was promotional advertising and what wasn't promotional advertising? We had an argument as to what we could put in as promotional advertising. We claimed if we put a label on a package that had their trademark "cellophane" on it, it was promotional advertising. They claimed it wasn't.

Q. Around 1940, a little prior to 1940, you were changed from a quantity discount to a straight flat discount; is that right?

A. That is what it looks like in this letter.

Q. When you changed from this quantity discount to a straight discount what type of contract were you offered by du Pont at that time?

A. I don't know much about the contracts. I know they just changed it. If we had a contract, I don't know what you would call it.

Q. Were there not two types of contracts entered into by du Pont at that time, one that was called a promotional converter contract and one a regular converter contract?

A. There must have been, because according to this letter they cover a 7½ flat. Everybody got that. And then you had the 2½ per cent. You had an extra 2½ per cent on your advertising on 50 percent of your advertising not to exceed 2½ per cent of your sales. It must have been two contracts because there the
9335 converter didn't promote and didn't advertise. There the converter got the flat rate.

Q. Do you know the difference between a regular converter and a promotional converter?

A. Yes.

Q. What is the difference?

A. A promotional converter is a converter that goes out and promotes new packages and gets someone to change the old method into our method; where the other converter promotes nothing. He goes out and he will quote you so much on this wrapper. He spent no money for promotion and no money for advertising. He quotes on the same wrapper we had promoted.

Q. Who decides that?

A. What?

Q. Whether you are a promotional converter or not?

A. It is easy to decide. You either do it or you don't. You either promote or you don't promote.

Q. Do you know the difference between a promotional converter's discount of du Pont's and its regular converter agreement?

Mr. McGLOTHLIN. Objection. There was no difference in the discount in the contracts the Government put in evidence.

By Mr. RENNINGER:

Q. Do you know the difference in the terms between a
9336 promotional converter contract and a regular converter contract?

A. I don't know the difference in the terms. I know the difference between a converter, promotional converter and a regular converter, but I don't know the difference in the contract.

Q. Was it not true that under a du Pont promotional converter contract you had to buy all your requirements from du Pont?

A. I don't know whether we were supposed to. I know I never

did. Maybe we were supposed to. My facts and figures will show that, actually who we bought from.

Q. Did you buy from Sylvania in 1937?

A. I can't tell you whether we bought in 1937 or not. We bought off and on from the time Sylvania started making cellophane. We tried to buy from them. We tried to use their material. I don't imagine there was a month which went by that I didn't talk to Sylvania in their office or our office. I can't tell you whether we actually bought from them in 1937 or not.

Q. Do you remember whether representatives of the Department of Justice visited your office and plant in 1950?

A. Yes—no, I don't know about that. I thought you were talking about another time they visited our office, not in 1950. They may have. I don't know whether I was there or not.

9337 Q. At that time your employees gave representatives of the Department of Justice figures as to your purchases of cellophane from du Pont and Sylvania?

A. No, I never saw it.

Q. You don't know that those figures show that you didn't purchase any cellophane from Sylvania in 1937, 1938, 1939, 1940 and I think about $100 worth in 1941?

A. I didn't know that, but I will tell you this: that lots of times Sylvania would ship cellophane in there and never bill us for it. As far as we were concerned, as we explained to Sylvania, we are wide open and anytime you can furnish us film, all we can run in our machine, we will use it. Sylvania shipped rolls of film into our plant and it was never billed at all. It was sent in as samples to try this out and try that out, but I can't tell you what years we purchased. When we first started I gave them an order for ten thousand pounds; one of the first orders they had from a converter.

Mr. RENNINGER. Mr. Clerk, I would like to have this marked Government Exhibit 5565 for Identification.

(Letter from J. H. Gauss to E. I. du Pont de Nemours and Company dated September 17, 1941, was marked "Government Exhibit No. 5565 for Identification.")

By Mr. RENNINGER:

Q. Mr. Martin, this purports to be a photostatic copy of a letter written by J. H. Gauss, sales manager of Shellmar

9338 Products Company, to E. I. du Pont de Nemours and Company dated September 17, 1941.

A. Yes.

Q. This is a copy obtained by representatives of the Department of Justice from your files in 1950.

A. I don't know. There is no signature on there. How do I know he wrote it?

Q. It is a copy.

A. I don't know who wrote it.

Q. Mr. Martin, this letter states in the third paragraph——

Mr. McGLOTHLIN. I object, your Honor. This letter hasn't been identified. Mr. Martin has never seen it before. You can't read a document into evidence——

The WITNESS. There is no signature on the letter. I can't tell who wrote it.

Mr. RENNINGER. It is a copy taken from the files of the Shellmar Products Corporation and wouldn't have a signature on it.

The COURT. The official of that company disowns it. He says he can't tell whether it was taken from his files. You haven't identified it yet. The test is, could you offer that in evidence when you come to your rebuttal? That is the test for identification.

It would seem to me, not that I am suggesting to the Government how to try its case, but if you got the man
9339 who typed that up in Ohio you might be able to use it. You can't use it at this moment.

9340 By Mr. RENNINGER:

Q. Who is Mr. J. H. Gauss, Mr. Martin?

A. Well, he is a man that used to work for us. He used to be a sales manager for us. He is not with us now, hasn't been with us for I don't know, five or six years.

Q. Was he sales manager on September 17, 1941?

A. I think he was. And, of course, we have divisions. We have a sales manager on the West Coast, and we have a sales manager in different divisions, that sign themselves as sales manager. I don't know. I can recognize Gauss' signature if I can see it. Are his initials below where the stenographer wrote it?

Q. There is an initial of a stenographer "R".

A. You see, there is no—I don't know. His name is typed on there. I don't know who the "R" is.

Mr. MINICUS. I submit that when documents have been taken in many cases in the past from the company's files, where naturally original went out to another company, coming from the company's files, typewritten signatures have been admitted into evidence time after time.

The COURT. That wouldn't disturb me for a moment if it was typewritten, but I want to know its authenticity.

Mr. MINICUS. It is typewritten on the back, your Honor.

The WITNESS. Here is the name, your Honor, right
9341 here [indicating]. That has been typewritten on there—then sales manager, central division——

The COURT. But that has been typed on. That is not part of the photostat. I don't know who typed that on there.

Mr. RENNINGER. This is the identifying mark of the individual who took the letter from the Shellmar files [indicating].

Mr. MCGLOTHLIN. Your Honor, we don't know that either. We don't know who took it from the Shellmar files, or even if it was taken.

The WITNESS. Somebody typed this on [indicating]. This wasn't photostated. This [indicating] is photostated from a letter but this [indicating] wasn't.

The COURT. As a matter of fact, there is some question as to whether it was the same typewriter.

The WITNESS. I don't think it is.

The COURT. Don't you know the gentleman from the Department of Justice who picked this up?

Mr. RENNINGER. We could have him come in.

The COURT. I will do this. I will allow you to pursue the examination of the witness and you take a short deposition of a page and a half of that gentleman in Washington, or wherever he is, to identify the document.

Mr. MINICUS. I think we would prefer to withdraw
9342 the document, your Honor.

The COURT. All right.

By Mr. RENNINGER:

Q. Mr. Martin, during the years around '37 to '41, was it not against Shellmar's policy to purchase cellophane from Sylvania?

A. It has never been against our policy to purchase cellophane from Sylvania. The only time that I didn't want to purchase cellophane from Sylvania was when we would lose money on account of additional waste and not a good product. That is the only reason we didn't buy it from Sylvania, because the more I could buy from Sylvania the better I liked it. I would rather have two or three sources of supply for cellophane than just one.

Q. I am speaking about the period from '37 through '41.

A. Well, our policy was no different then than it was in '33 or '34 or '45. It was all the same.

Q. And you don't know that by the terms of your promotional converter agreement with du Pont you were prohibited from purchasing cellophane from Sylvania in those years?

A. I have never been prohibited by du Pont from purchasing cellophane from anybody.

Q. Even though it was so worded in the contract?

A. I don't know what was in the contract, and I didn't
9343 even care whether I signed a contract, because du Pont were very glad to sell us cellophane. We were out promoting their product and they certainly wanted to sell it to us, and I didn't have to sign a contract to buy. They were tickled to death to sell it to us.

Q. Well, why did you sign a contract then, Mr. Martin?

A. I don't know; if they presented a contract that would give us cellophane and they wanted it signed, I would sign it.

Q. But, Mr. Martin, if they presented two types of contracts to you, one which required you to buy all your requirements from du Pont and the other one permitted you to buy it from whomever you pleased, why would you then sign the one contract which required you to buy all your purchases from du Pont?

A. Well, if one contract gave me more money from du Pont and made cellophane cheaper than the other contract, I would sign the one I could get the cheapest.

Q. What if they were both the same?

A. I don't know whether they were the same. I don't know even if there were two contracts. I don't believe they ever showed me two contracts.

Q. Only showed you the promotional contract?

A. I don't know. I don't know whether they had two contracts, and frankly I can't tell you what was in the
9344 contract.

Q. Mr. Martin, when did you first purchase any large quantities of cellophane from Sylvania?

Mr. McGLOTHLIN. Could we have "large" defined? We have a 10,0000 pound order—I just want to know if that is large or not.

The COURT. What about it?

By Mr. RENNINGER:

Q. Well, I would say approximately $1,000 a year.

A. I have given them an order for much over a thousand dollars the first year they were in business.

Q. That would be 1930?

A. I don't know—whatever year; you have got it there; you have got the dates—whenever they started.

Q. What about 1937?

A. Well, you just said to me a little while ago I didn't buy any cellophane in 1937, so if that is it, I couldn't have bought anything.

Q. After 1940 then when did you first purchase any large quantity of cellophane from Sylvania?

A. I presume you mean by large quantities steady, or getting it monthly, and so forth—I purchased that as soon as they had a sheet that I could run and get production without having too much waste.

Q. Do you know when that was, Mr. Martin?

9345 A. No. I would have to look up the dates on it.

Q. Mr. Martin, did not you and Mr. Gilfillan have a meeting with the officials of du Pont on September 21, 1942, in which you told du Pont that you didn't want to sign that pro-

motional converter contract with them any more and that you wanted to buy from Sylvania?

A. Well, I might have had a meeting that date. I had several meetings with du Pont. I probably had meetings with du Pont every month for years, and sometimes twice a month. Now, whether Mr. Gilfillan was along—I didn't tell him I wanted to buy anything—if I decided at that time that I was going to get a steady supply from Sylvania, I told du Pont I was going to get a steady supply from Sylvania. I never asked their permission to do it.

Q. You didn't?

A. No, sir.

Q. You didn't come to them and tell them that you felt that the reasons for the promotional converter contract with du Pont were no longer important because of the war and that you desired to purchase cellophane from Sylvania?

A. I don't think the promotional contract was—will you restate that again. I don't get that.

Mr. REININGER. Will you read it, please.

(The Reporter read the last question.)

The WITNESS. I never told du Pont I desired to
9346 purchase from Sylvania. If I told du Pont anything, I told them I was going to purchase it from Sylvania, but during the war, when Cellophane got short and got allocated, and things of that kind, why, of course we put up with qualities of cellophane we would never put up with in normal times, but I never asked their permission or anything about buying. If I told them anything, I told them I was going to buy it from them.

Q. Even though you had a promotional converter contract with them at the time?

A. If we did have or we didn't—it didn't make a particle of difference as far as I was concerned.

Q. What was the principal use that the cellophane that you purchased from Sylvania was put to by you?

A. The principal use?

Q. Yes, during the war.

A. Well, I think it was making gas capes.

Q. Mr. Martin, have you ever resold cellophane just as you received it from either du Pont or Sylvania without converting it, that is, printing it or converting it to bag, or something of that sort?

A. Generally we have not. I have sold it once in a while in very small quantities, but we have never made a practice of it.

Q. Do you know whether or not that was permitted by your promotional converter agreement with du Pont?

9347 A. Well, I don't know about the agreement, but I know we discussed it hundreds of times and it was understood between the converter and the supplier, whether it be Sylvania, whether it be du Pont, that we would not sell unconverted material. So we never made a practice of doing it.

Q. Returning to the advertising allowance, Mr. Martin, did you ever receive an advertising allowance from du Pont?

A. I think we did, yes.

Q. Do you know what the advertising allowance was?

A. You mean the percentage we got or you mean the total amount?

Q. Will you please explain what the advertising allowance itself was.

A. Well, I think it was they paid us for 50 per cent—there was a period in there—of course, this arrangement was changed so many times, but there was a period where they would pay us for 50 per cent of our advertising expense providing it didn't amount to over two and a half per cent of our purchases, or something—I don't know; it was something like that.

Q. Was that provided for in your contract?

A. I don't know whether it was or not. I couldn't even tell you if the figures I gave you are exactly correct, but I knew we
9348 got something back for the money we expended for advertising.

Q. Do you know how many years that advertising allowance existed?

A. No, I don't know. My impression is it was for a year or two. Now, I couldn't swear to that.

Q. Were you satisfied with the advertising allowance?

A. No, sir.

Q. Do you know why the advertising allowance provision was terminated by Dupont?

A. No, I don't know. I know this, that we were in a continual argument all the time as to what was advertising and what wasn't advertising, and I always figured we got about half as much as we had coming.

Q. I think you stated, Mr. Martin, that you had the right to use the Dupont cellophane trade-mark, is that correct?

Mr. McGLOTHLIN. I think it is a standard label. The name cellophane was the trade-mark, which was finally abandoned. The standard label is a red, white and blue label which said "Dupont cellophane."

By Mr. RENNINGER:

Q. Did you have the right to use the cellophane label, then?

A. I suppose we did. We used them. I don't know as I got any formal okay to use it. I know we used it.

Q. Was this an advantage to Shellmar?

9349 A. Well, I suppose our advertising department would think it was an advantage because they would figure it would tie up with their national advertising. In my mind, there was a big question as to just how valuable it was. I don't think it was as valuable as Dupont thought it was.

The COURT. You don't talk like a satisfied customer.

The WITNESS. Dupont never told me what to do. I built the business up and fought to build it up. As far as their labels are concerned, as I say, advertising men will say it had a big value, but after all I've got to be practical and it is up to me whether I made a profit or don't make a profit, and certainly that label didn't make that profit for me.

Q. Did you use the Dupont insignia on your labels; that is, the labels that you used?

A. Some of them we did and some of them we didn't. If they furnished the labels, sometimes we printed it on and we tried to get them to pay for half the printing. But what we were advertising was our trade-mark and Shellmar; it wasn't Dupont.

Q. Mr. Martin, I show you this document and ask you if you remember this document and the circumstances surrounding it. This purports to be a photostatic copy of an inter-office memorandum from B. Verson, of Shellmar, to the attention of Mr. B. W. Martin, dated January 23, 1941.

A. That's right.

9350 Q. Can you identify that?

A. I don't remember. In reading the letter there's no question but what the letter got on my desk. It refers to an agreement and it refers to some allowance, or rebate, we got if we featured the manufacturer's product by name. Frankly, I didn't pay an awful lot of attention to it. No doubt it was in my mail.

Q. You feel this is a true copy of a document obtained from the files of Shellmar?

A. I think it is, yes.

Mr. RENNINGER. I would like to have this document marked Government's Exhibit 5566 for identification.

(Photostatic copy of inter-office memorandum from B. Verson of Shellmar Products Corporation, to the attention of Mr. B. W. Martin, dated January 23, 1941, was marked for identification as "Government Exhibit No. 5566.")

By Mr. RENNINGER:

Q. Mr. Martin, this document from Mr. Verson of the Shellmar Products Company, dated January 23, 1941, discusses the new Dupont promotional converter agreement, does it not?

A. Dupont promotional converter agreement?

Q. Who is Mr. Verson, Mr. Martin?

A. Well, he was treasurer of our company. He is not now but he was at that time.

Q. Does not this document read, Mr. Martin: "Attached
9351 are two copies of the new Dupont promotional——"

Mr. McGLOTHLIN. Your Honor, I object to this reading. This document doesn't run against Dupont. There is no showing that it ever came against Dupont or that Dupont ever saw it. It is an inter-office memorandum of Shellmar.

The COURT. What is the critical paragraph, Mr. Renninger?

Mr. RENNINGER. The fourth paragraph. It also explained to Mr. Martin the various terms and provisions of the Dupont contract. In that promotional converter contract, Dupont and Shellmar were parties.

Mr. McGLOTHLIN. We have no objection to their bringing up the Shellmar-Dupont promotional converter contract. This however is a series of comments, inter-office, in another company as to the terms of that contract.

The COURT. Well, the fourth paragraph refers to Dupont.

Mr. McGLOTHLIN. Yes, I agree it refers to Dupont, but this is a statement which never came to Dupont's attention, so far as is shown, discussing a contract with the Government has as to this man's belief as to what the contract means and how it changes.

The COURT. Are we going to have the contract in evidence?

Mr. McGLOTHLIN. I can't answer that.

9352 The COURT. What we are after is the contract Shellmar had with Dupont. If it is available, it seems to me that is the critical fact.

Mr. MINICUS. May I submit it is the other side that brought this contract into the testimony. This morning the witness was asked if he had a requirements contract. They didn't bring the contract up at that time, but by introducing that contract I think it is subject to fair discussion on cross-examination without the contract being in evidence. It was not the Government that brought up the contract in this case, your Honor, but questioning on direct examination about this requirements contract.

The COURT. And this is the particular contract under discussion?

Mr. MINICUS. This is the contract we are talking about.

Mr. RENNINGER. Also, your Honor, there are various documents already in evidence showing that Shellmar was a promotional converter at this time.

The COURT. I am ready to rule.

Objection overruled. Proceed, Mr. Renninger.

By Mr. RENNINGER:

Q. The third paragraph of this document reads, does it not, Mr. Martin:

"Last year's agreement stated that we would be allowed
9353 the sales allowance rebate if we featured the manufacturer's product by name. This year's contract states that we must feature the manufacturer's product under its trade-mark Cellophane. This is a minor technicality since we submit all items to Dupont for approval before going ahead, and I do not think it a very important point."

Is that correct, Mr. Martin?

A. That is in the fourth paragraph?

Q. Yes.

A. I thought you said the third paragraph. Yes, that's right, that is the fourth paragraph.

Q. Do you remember, Mr. Martin, what that paragraph meant to you at the time?

A. No, I don't. I frankly don't remember the letter, but there is no use me presuming, because I don't even remember reading it.

Q. Does not the third paragraph also say:

"Under this agreement we agree to purchase all of our cellulose film requirements for conversion purposes from Dupont. This clause was also added in last year's agreement."

A. Yes, sir, that is in the third paragraph.

Q. And this was a document by Mr. Verson addressed to yourself in 1941 to explain the provisions of the Dupont contract?

A. That's right.

9354 Q. Mr. Martin, do you know the difference between a fabricator and a converter?

A. Well, you've got to get pretty technical. It is a pretty fine line. Of course, converting is a much broader term than fabricating. Usually if you fabricate anything you put it together; you laminate, you actually put one thing with another, attach it; where with the converting, if you print on it or if you trim it, or if you fold it or do anything like that, you convert. Lots of times you print and laminate at the same time, so you are both converting and fabricating.

Q. Mr. Martin, is laminating a fabricating function?

A. I don't know. I am not that technical. I would have to get a dictionary and look up the word fabricating. I always figured that a converter covered all of those operations. Some people call it fabricating and some people call it converting. Frankly, I am not smart enough to give you the difference between the two names.

Q. Are you speaking of the cellophane industry?

A. I am talking about our business, which is partly cellophane. We are referred to as a converter. We laminate and we coat and we print and we make bags and we make envelopes and packages, and they call us a converter. We call ourselves a converter. I don't know, maybe some people call us fabricators.

Q. Do you know the difference between a Dupont fabricator and a Dupont converter?

9355 A. No.

Q. Do you know whether or not a Dupont fabricator received a straight discount of three per cent whereas a converter received a discount of ten per cent?

Mr. McGLOTHLIN. May we have the time, because these discounts changed?

Mr. RENNINGER. Well, seven and a half plus two and a half per cent advertising allowance from 1939 to 1941, and a straight ten per cent discount after November 1941.

Mr. McGLOTHLIN. To 1947?

Mr. RENNINGER. To 1947.

The WITNESS. You mean a fabricator got a different discount from a converter?

Mr. RENNINGER. Yes, sir.

The WITNESS. The only thing I knew there was any difference in discounts was in the consumer—that is, the user, the direct user—such as a baker who would buy plain cellophane and Dupont shipped it right into this bakery.

Q. That was a direct user, though, was it not?

A. Yes. They had a certain discount up to a period, and we had a different type. But I didn't know there was any other discount. I didn't know there was a difference between a fabricator and a converter. I know there was a promotional converter and a non-promotional converter, but I never knew there was another discount or fabricators.

9356 Q. Have you ever made cellophane ribbon or tape, Mr. Martin?

A. A little of it, but we stopped making it.

Q. Have you ever manufactured garment bags from cellophane?

A. No.

Q. Have you ever manufactured cellophane liners for boxes or tin cans?

A. Some, but not very much; not out of cellophane. We do a lot of liners but not out of cellophane. We make them out of other materials.

Q. Mr. Martin, have you ever purchased any cellophane from foreign producers?

A. Yes, purchased a lot of it.

Q. During what period?

A. Ever since we had foreign operations.

Q. I am speaking of your activities in the United States.

A. Well, our activities are here. Our foreign division is operated right from here, but we do buy from British cellophane, we

buy from France, we buy from Belgium, from Germany, we have bought from Italy.

Q. During what periods of time?

A. Ever since we started our foreign plants. The first plant was Mexico City, the next was Colombia, and the next plant was in Brazil. We never bought any foreign cellophane to
9357 use in the United States.

Q. That's what I mean.

A. Well, I don't see how you can do that with a 45 per cent duty.

Q. You feel the price is prohibitive?

A. It is prohibitive, certainly. I went down to Washington and tried to get it cut, and after I went all along the line trying to get the duty cut to 22½ per cent, I didn't succeed in doing it. Then I tried negotiating with somebody in St. Louis to get it done.

Q. Do you know how the price of foreign cellophane compares with that of the domestic?

A. Yes, sir. It is much higher and much poorer in quality.

Q. Have any of your customers in the United States ever purchased any foreign cellophane, do you know?

A. Yes, I know of one.

Q. Why would he do that?

A. Because he couldn't get it in the United States, and he wanted it so bad he went outside to get it.

Q. Mr. Martin, I think you stated that you print wrapping materials by the rotogravure process, is that right?

A. Yes, sir.

Q. Is that a process that you yourself developed?

A. No. Well, I would say we did 90 percent. We didn't
9358 get the idea but we did develop from nothing up to what it is now.

Q. Is there a patent on that process?

A. Not any more. It expired about a year and a half ago.

Q. Did you license other converters to manufacture under that process?

A. Yes, sir.

Q. Did any other companies besides Shellmar's licensees use this process?

A. Yes, sir.

Q. The same process?

A. Yes, sir.

Q. Were not these companies violating Shellmar's patents?

A. Yes, sir.

Q. Did Shellmar ever take any action against these users?

A. Some of them.

Q. This rotogravure process, did you set the price at which the

printed articles, that is, articles printed by the rotogravure process, should be sold?

A. Yes, sir.

Q. And your licensees also followed that price?

A. Yes, sir, they were supposed to. They didn't, but they were supposed to.

Q. Did the companies, not Shellmar's licensees, follow these prices?

9359 A. No, sir.

Q. What other types of printing, Mr. Martin, is Shellmar engaged in?

A. Letterpress and aniline.

Q. There are three types of printing?

A. Yes, sir.

Q. Shellmar, of course, has purchased large quantities of cellophane for many years, has it not?

A. Yes, sir.

Q. And you have been able to convert and sell this cellophane to your customers, have you not?

A. Yes. That's what we are doing. That's how we built our business up.

Q. What do you think of cellophane as a flexible packaging material?

A. I think it is a fine material.

Q. What do you feel are the principal characteristics of cellophane?

A. Well, it has a nice surface to print on. That is one thing.

Q. Are there any others?

A. It has its good points; it has its bad points. It used to be that when cellophane first came out it was transparent, and of course we all thought having a transparent package would

9360 be a very fine thing. But as the years went by that situation changed to a point where the transparency was secondary, and it got to be more of a protective sheet. Of course, they have improved the coating and improved the moistureproofness of the sheet, and made the sheet so it was heat sealing, enabling us to use it on automatic equipment to seal the package. That became more important then than the transparency.

Q. What do you consider to be cellophane's outstanding characteristic as a packaging material?

A. Right now I think the best characteristic today is its protective qualities to the product that it wraps.

Q. Do you think it gives good protection?

A. Yes, I think it does. That is, for the money. Now if anybody wants to protect a product, the more they protect it the

higher the price is. Cellophane falls in a certain category, and you can get reasonable protection at a relatively low price.

Q. I believe, Mr. Martin, your 1947 annual report states that packages have two principal functions: To protect their contents and to help sell the product. Shellmar packages do both.

A. That's correct.

Q. And you feel that cellophane gives adequate protection?

A. No, it doesn't. There are many cases where cellophane does not give adequate protection.

9361 Q. How does cellophane compare with glassine as far as protection is concerned?

A. It depends. A sheet of certain types of molstureproof cellophane gives you more protection than one single sheet of glassine, but there are different grades of glassine. It used to be you didn't have the grades but they are now treating glassine to give it more resistance to vapor transmission than it used to. So it all depends on what sheet of cellophane you use and what sheet of glassine you use. There are too many different kinds.

Q. How is it then, Mr. Martin, that you sell so much more cellophane than you do glassine?

A. Because, as I stated this morning, if I go in to sell a job, in the first place we try to sell cellophane because it is a higher class, higher priced product. I would rather sell ten tons of cellophane than I would ten tons of glassine, because I am making a bigger sale. We have set up and built our machinery, built all of our equipment, to handle a delicate sheet in this particular type of material. We havn't built it it to handle glassine.

Q. How are you able to sell it, Mr. Martin?

A. By good salesmanship.

Q. Good salesmanship only? Do you think that the quality of cellophane has anything to do with it?

A. A lot to do with it. I think you've got to have some-
9362 thing to sell. It is pretty hard to go in and sell a man something and make him spend three times as much as he customarily spends.

Q. What is it then in cellophane that enables you to sell it, since it does cost three times as much?

A. Listen, I have been at this thing for thirty years, and I started in from the bottom and I worked. It's been a lot of hard work and sweat to learn how to sell it. It's the same as you standing up there questioning me. You couldn't have done that ten years ago, but every day you are getting better. The same with me. Every day I am getting better.

I can sell cellophane where another fellow can't sell. I can take salesmen on the street that have been selling all their lives, and

they can't begin to sell cellophane, and yet they have been salesmen all their lives.

Q. Mr. Martin, you started out, I believe, as a glassine wrapping manufacturer?

A. Yes, sir, and salesman.

Q. Why then did you transfer your, shall I say love, from glassine to cellophane?

A. Because I like the product better. I thought there was a bigger potential market and a much more exclusive market as far as competition was concerned, in cellophane than there was in glassine. When I started in the business there were several
9363 people printing glassine, but there wasn't anybody printing cellophane to amount to anything. I figured that if I could do things that were harder to do, and take a product that was much harder to handle than glassine, that I could go places and get there faster than I could handling glassine. I think that has proven out.

Q. Mr. Martin, when you go out to sell a cellophane package, what characteristics or features of cellophane do you stress?

A. I don't go out to sell a cellophane package. I go out to sell a package, and before I sell a package I first find out what the product is. Many times I tell the customer not to use cellophane, it isn't the proper material to use in his package, and I give him something else entirely.

Q. Why, Mr. Martin?

A. Why what?

Q. Why do you try to get him not to use cellophane?

A. Because if I go in to a customer and if I sell him a package to put his product in, and if that package does not prove out as I say it will and won't sell his product or doesn't preserve his product, and he accepts it and then he puts his product in that package and it fails, I can never go back there and sell him anything else.

Q. In other words, Mr. Martin, for certain products there is a certain type of packaging material that will or will not be satisfactory?

9364 A. There is always a product that is better than another product. There are some products that are on the market that are in the wrong type of wrapping entirely. I have taken packages out of cellophane and put them in a different kind of wrapping.

Q. Because you felt in that particular case——

A. I felt that I could do a better job of packaging with something else.

Q. Mr. Martin, in your 1946 annual report I notice this statement:

"Transport bags—literally thousands of products are most conveniently packaged in bags. When the bags are made of protective materials, the products keep better. When the material is transparent, the contents are given a chance to exert eye appeal, and when a beautifully printed design is added, the package has every essential element for success."

A. Yes.

Q. Do you agree with that statement wholeheartedly?

A. It is a good sales talk.

Q. Do you agree with it?

A. It is a good thing for our stockholders to read, and a good thing for our customers to read. No, you can't agree with it all the time. Cellophane is a good material. In some cases I tell a man he should positively use cellophane. But as far as I am
9365 concerned, my job is to sell him a package, the best package I can sell him, and if cellophane fits into the picture, that is where I put it.

Q. Mr. Martin, if a customer of yours came to you and said, "I have a product; I don't care particularly about the cost, I want it wrapped in something that is clear transparent." What wrapper would you recommend?

Mr. McGLOTHLIN. I object, your Honor. It is a false hypothesis to think that the customer doesn't care about the cost. The testimony is entirely to the contrary.

The COURT. This is a hypothetical customer.

Mr. RENNINGER. Well, let's say moderate cost, then.

A. First I would want to see what product he wanted to wrap. I might use cellophane; I might use acetate; I might use pliofilm; I might use a vinyl sheet, if he wanted full transparency.

Q. Would you use waxpaper?

A. No, you couldn't use waxpaper if he wanted transparency.

Q. Would you use glassine?

A. No, because that is a translucent sheet.

9366 Q. And when you go out and sell them, Mr. Martin, you size up what is to be packaged and how it will appear to best advantage, is that correct?

A. I consider the cost of the package and how he packs it, how it will work on automatic wrapping or packaging machine—there are a lot of things you have to consider before you can definitely recommend the right kind of a wrapper on a product.

Q. And it depends on the function of the article to be wrapped?

A. That is correct.

Q. Is it not true that cellophane is more transparent than the other papers and films with the possible exception of cellulose acetate?

A. Well, it certainly is more transparent than paper.

Q. By paper I mean the glassine and wax paper.

A. Glassine and wax paper, some of it is opaque and some translucent. There is none of it transparent. You have got certain films that are transparent as you have paper films, glassine, which is not transparent.

Q. Mr. Martin, how does cellophane compare to other flexible packaging materials in machine running characteristics?

A. Well, it depends. You see, cellophane was one of the first widely used transparent films, and the packaging
9367 machinery manufacturers built machines—when they got going to build machines for automatic wrapping, they built the machines to handle cellophane. Well, of course, when there are so many other films coming in, why they are building their machines so they will not only handle cellophane, they will handle other transparent materials.

Now, there are some materials that are hard to handle on an automatic machine. You take acetate, for instance, you put it on a machine and it is awful hard to run because acetate is full of static and sticks to every piece of iron it touches, and you have to hang tinsel all over the machine to pull the static out to the sheets to run through it.

I would say that cellophane, taking all the transparent materials, I would say there is more effort and engineering that has been put into machines to handle cellophane than anything else because it has been the most widely used in transparent materials.

Q. How does polyethylene run on a wrapping machine?

A. It doesn't run.

Q. It doesn't run?

A. It doesn't run, no. They are just now engineering machines to use polyethylene on wrapping machines.

Q. How about pliofilm?

A. Pliofilm runs, but not as good. There are certain changes you have to make in order to do it, because, you see,
9368 most of all of the automatic wrapping of cellophane somewhere along the line—they seal it, and of course cellophane is sealed with heat and pressure, and it is sealed by having a coating on both sides of the basic sheet, where with pliofilm, if you would put the same amount of heat on pliofilm, it goes all the way through the sheet and just melts right there and becomes sticky, I mean—it is so sticky you couldn't pull it through a machine. So you have to be very careful when you seal pliofilm, because it welds, it doesn't seal like cellophane.

Q. How about Saran, Mr. Martin?

A. That heat seals, but the only trouble with Saran is if you heat seal it, it becomes brittle along the seam that is heat sealed.

We are having some success by sealing it electronically, that is, with electric wave.

Q. How does cellophane compare to the other flexible packaging materials as far as the heat sealability is concerned? I think you have mentioned several of them. Can you heat seal cellulose acetate?

A. No.

Q. It has to be glued, is that right, with solvent?

A. Yes, sir.

Q. And I think you mentioned that polyethylene and pliofilm heat seal very poorly?

A. Very good, pliofilm.

9369 Q. I misunderstood you.

A. When you say heat seal, you mean sealed together to make a package. Polyethylene, the same as pliofilm; they weld together—the whole sheet just melts and welds together. Now, with cellophane it is different; all you are doing is sealing the coating on the cellophane; you are not sealing the base sheet. So as I say, you have to use heat and pressure to get a seal on cellophane, where with pliofilm, all you have got to do with pliofilm is run it over some heat, or put some intense heat on it; just the heat itself will seal it.

You can bulk seal pliofilm or polyethylene where you can't bulk seal cellophane. That means you can take and cut a whole stack of pliofilm sheets and take a gas flame and run it up and down sealed pliofilm or polyethylene, but you can't do that with cellophane.

Q. How does cellophane compare to these other flexible packaging materials as far as prices are concerned?

A. In most instances it is cheaper.

Q. Let us take, say, wax paper and glassine.

A. Cellophane is much more expensive.

Q. Vegetable parchment.

A. It is more expensive than vegetable parchment.

Q. And greaseproof—in fact, all the other papers——

A. Cheaper than cellophane per square inch.

9370 Q. What about the films, the transparent films?

A. Cellophane is the cheapest.

Q. In other words, then, cellophane comes between the papers and the other transparent films?

A. That is right; but you have got to understand this, that there are some of these films that are new, some of the films are just coming out. I wouldn't be a bit surprised when polyethylene will sell cheaper than cellophane.

Q. Incidentally, Mr. Martin, speaking of polyethylene, that is made from polyethylene flake, is it not?

A. Yes, sir.

Q. Do you know who makes the polyethylene flake?

A. Yes.

Q. Who makes the flake?

A. du Pont make it and Carbon and Carbide make it.

Q. Are they the only two companies that make the flake?

A. At the present time in the United States, no; it is made in Europe, made up——

Q. I am speaking of in the United States.

A. It is going to be made in Canada. They are building a plant now. But in the United States there are two companies making it.

Q. And who manufactures polyethylene film?

A. There are about three hundred people in it now.

9371 Q. And the film which is made from polyethylene flake is purchased from either du Pont or Carbide and Carbon, is that correct?

A. At the present time, yes.

Q. Do you know whether du Pont sells flake to these other manufacturers of polyethylene film?

A. Oh, sure, I suppose they do. They have salesmen out trying to get business all the time if they have anything to sell, but the trouble is, they haven't had anything to sell. The Government has taken all of it for the last year and a half, I suppose. There is very little we can buy.

Q. Does du Pont also manufacture polyethylene film?

A. Yes.

Q. Mr. Martin, I noticed in your discussion of your purchases of the various flexible packaging materials that you had quite a large amount of aluminum foil that you purchased, is that correct?

A. Yes.

Q. What is that principally used for by Shellmar?

A. Oh, we use this for wrapping airplane engines for Pratt Whitney—we do a lot of Government work; it is used for parts packaging for all these instruments that are made and shipped across the ocean and stored in these warehouses. It is used on oleomargarine; it is used on Lipton's chicken noodle soup.

9372 It is used on dry yeast. It is used on, well all types of wrappers.

Q. Mr. Martin, what percentage would you estimate of the aluminum foil that you buy goes into food products and what goes into I suppose you would call it industrial use?

A. Well, right now, of course, you have got a very distorted picture: I would say the majority of it right now is going into Government and industrial use.

Q. Would you estimate a percentage on that, Mr. Martin?

A. Well, as far is we are concerned, I presume it probably runs

fifty-fifty. We try to stay in the food picture as much as we can, but I would say that it is about fifty-fifty. I think there is about fifty per cent of it used for industrial use and fifty percent for food. Now, I wouldn't want to swear to that; but that is my idea.

Q. Mr. Martin, I think you also stated that you always used aluminum foil with some type of backing, is that correct?

A. Yes, sir.

Q. Is that necessary?

A. Yes, sir.

Q. Is aluminum foil taken by itself heat sealing?

A. No, sir.

Q. How does aluminum foil compare, say, to cellophane as far as bursting and tear strength is concerned?

A. It has no burst or tear strength. It has no strength
9373 at all without any backing—unless you get a thick sheet, you understand. I am talking now of a thin sheet comparable with cellophane.

Q. Speaking of, say, .00035?

A. .00035, that is your regular thickness that is used for packaging.

Q. Is this aluminum foil subject to pinholes in the lighter gauge?

A. Yes, it is; it is full of pinholes.

Q. Mr. Martin, do you know whether in the manufacture of glassine envelopes is it necessary to use a different bag making machine than that used for the manufacture of cellophane bags?

A. It isn't necessary as far as actually making the bag, but it is necessary to stay in business and make a profit, because a regular glassine machine will run glassine bags up to fifty, sixty thousand an hour, or one hundred thousand an hour. Now, I can run glassine on a cellophane bag machine, but it is altogether too slow, and I couldn't stay in business; I couldn't make any profit.

Q. Does glassine heat seal as well as cellophane?

A. You can heat seal it if you coat it, but you can't heat seal it at all if you don't coat it.

Q. Mr. Martin, in 1932 or 1933 did you plan or attempt to set up a bakery wrap plant near a cellophane plant for the purpose of printing cellophane bread wraps?

9374 A. Did we attempt to?

Q. Yes.

A. No, we never attempted to. We talked about it, talked about the advisability of it, but we never attempted to do it.

Q. Did you have various correspondence with du Pont relative to that situation?

A. I don't know. I have had discussions with various people in the du Pont Cellophane Division about it.

Q. Well, why did you not go into that project in 1943?

A. In 1943?

Q. Yes.

A. Well, there wasn't, as I remember it—wasn't the war on then?

Q. Yes.

A. Well, we couldn't go in anything; we couldn't put up any plants during that time; we couldn't get any cellophane. We didn't have enough cellophane to take care of our regular customers.

Q. Mr. Martin, did you not in 1933 go to du Pont and make a proposal to build a bread wrapping plant near one of du Pont's cellophane plants for the purpose of making bread wraps?

A. Well, I don't know as I made a proposal. I sat down and I discussed how I would recommend going into the cellophane bread wrapper business, and I thought it would be a
9375 good idea if we went into that business, to put the plant right next to a cellophane plant and get away from the transportation charges; but I don't think I actually put a proposal to them. I may have written them. I know I talked to them. I don't think I ever wrote them a letter. Maybe I did. But I don't think I ever gave them an actual proposal.

Q. Do you remember what du Pont told you when you put this proposal to them?

A. Well, I got about four answers. Everybody I talked to told me something different.

Q. What was the principal answer? What was the main answers?

A. Well, I talked to Mr. Hatt, who of course isn't here now, about it. He thought it was a good idea. Generally speaking everybody thought it was a pretty good idea—I mean, if I was talking to people in direct sales, they didn't think so, but if I talked to the converter division, they did think so, and that is the trouble, that they have two sales organizations, a direct sales that fights the converter sales, and we are in the converter end of it. If we get the business, they don't get it.

Q. Mr. Martin, were you promised any cellophane if you did set up a bread wrapping plant?

A. No, I wasn't promised any cellophane. That is one thing I wasn't promised. I have been fighting to get more of
9376 it, but I wasn't promised any cellophane.

Q. In other words, during the war cellophane wasn't even used to wrap variety breads to any great extent, is that true?

A. I don't know because we did very little bread business during the war, and we didn't begin to have enough cellophane to

take care of our regular accounts—in fact, we had to cut off a lot of accounts, and we lost a lot of accounts.

Q. I noticed also in your 1946 Annual Report this statement, that "Variety breads are coming back into production and are again depending upon color-free printed cellophane for eye appeal and protection".

A. Well, that is what we tell our salesmen, so they will go out and go after the business.

Q. Mr. Martin, do you feel that cellophane is essential today in the National economy?

A. Why, I think it is a commodity just like paper. I think cellophane is a commodity just like paper is or cloth or foil or anything else. It ceases to be a luxury; it is a commodity.

Q. But do you think it is essential today?

A. Well, if tomorrow we could get no cellophane, we would go along just the same, if that is what you mean. It is not essential, no. We can live without it.

9377 Q. You can live without it?

A. Why, sure.

Q. Is Shellmar a member of the Flexible Plastic Container Industry Advisory Committee of the N. P. A.?

A. I really don't know. I don't have much to do with that, and we have got fellows that go to all these meetings and every thing else. I don't know whether we are a member or whether we are not, to tell you the truth.

Q. Do you know Robert L. Lee?

A. Yes; he is our sales manager.

Q. Is he not the Shellmar representative on this Advisory Committee.

A. I really don't know. I know the Government wanted him to go over to Europe for a while, and he was over in France for a while. I think he had a good time over there, but how much good he did I don't know, but whether he is on a committee or not, I don't know that.

Q. Mr. Martin, on this coffee bag, will you tell me again what are the various articles that go to make up this bag (indicating)?

A. Yes. What you have your hand touching there is cellophane and right under it is a laminate, and next is a .00035 foil, and then inside of that is 50 pound kraft coated on both sides with a heat sealed lacquer.

Q. Now, what purpose does each one of these articles

9378 used in here serve?

A. Well, the inside kraft gives the package strength and prevents the bag from breaking so that the coffee won't have any chance if the bag breaks of rolling out on a shelf in the store or spilling out. That is the purpose we put that in there for. A

combination of the foil and the cellophane is put on to protect the flavor and keep the flavor of the coffee in the bag. That is the number one function.

Now, we use the cellophane by reverse printing—you are not touching the printing; the print is underneath the cellophane, so you can't rub the printing off. Now, that is for decoration and for appearance and what we call impulse selling, and you will agree that it has a nice feel, it feels nice, and there is nothing rattly about it; it feels like quality.

Q. And that is the purpose served by the cellophane here?

A. First to protect the coffee, because the foil won't protect the coffee because it is full of pinholes. So in order to eliminate the pinholes, we laminate the moistureproof cellophane against the foil and use the laminate plus the cellophane to plug up all the pinholes in the foil.

Q. In other words then, Mr. Martin, each one of the flexible packaging materials on this article has a certain
9379 separate and distinct use?

A. Yes, sir.

Q. I think you called this an opaque bag?

A. Yes, sir.

Q. Is it true that the cellophane does have a transparent purpose in that it shows up the printing that you have on here to great advantage?

A. Well, we can print the outside—I could print that on the outside and you couldn't tell the difference.

Q. Well, why is it printed on the inside?

A. Because we print it and laminate it at the same operation, and that saves us a complete operation. We can print it and put it onto the foil at the same time, and we use the ink as a laminate.

Q. On the onside instead of using cellophane could you have gotten an eye-appealing package——

A. Yes.

Q. A. From, say, wax paper?

A. No, but I can put—

Q. Glassine?

A. Yes. I can put a transparent sheet of glassine on there but I wont get the protection. I wouldn't get the paper protection that I am getting with that package—at least that is what my laboratory tells me. They test all the sheets and evaluate all the sheets.

9380 Q. Mr. Martin, I think you stated that at various times you have paid du Pont for some of the services that they gave you; is that correct?

A. I don't know for sure whether we have. I have offered to

pay them. Whether they ever accepted any pay or not—I don't imagine they did.

Q. You don't think in the last analysis that you ever did?

A. I have offered to pay them for any services when they would send a man in or to help us or things like that. I have offered to pay for it, be glad to pay for it. Maybe I have paid for it. Maybe I have paid for it indirectly—I don't know.

Q. Mr. Martin, I think you stated that you felt that the quality of Sylvania cellophane was not as good as that of the du Pont cellophane?

A. Yes, sir, and I have told Sylvania that many times.

Q. du Pont, though, is able to sell a certain percentage of cellophane; is that right?

A. du Pont?

Q. Sylvania is able to sell a certain percentage of cellophane?

A. Oh, yes, sure.

Q. Do they have some converters who are able to print and bag-make Sylvania cellophane?

9381 A. Yes, sir.

Q. I don't quite understand, Mr. Martin, if there is this difference between the two products how you were able to give some du Pont cellophane to B. M. T. when you were supposed to furnish them Sylvania film? Couldn't they tell the difference?

A. No, they couldn't tell the difference. In fact, they never looked at it. You see, we ship the product—you are talking about Blake, Moffat and Towne?

Q. Yes.

A. We ship a box of products in to them, maybe a hundred boxes; they wouldn't open every box and look in there. All they did was put the customer's name on and ship it to the customer. I could take a Sylvania bag and a du Pont bag of their product and show it to you and you couldn't tell the difference. I can't tell the difference, not unless I take it in the laboratory and put it through certain tests.

Q. I see. In the laboratory there are certain distinct——

A. Yes, that is right; or if I put it on the machine, if I look at the waste figures, I can tell you very quickly which is the Sylvania roll and which is the du Pont roll.

Mr. McGLOTHLIN. Your Honor, the witness has been under cross-examination an hour and a half. Could we have a five-minute recess?

9382 Mr. RENNINGER. I think I have but five minutes left.

The COURT. Very well, five minutes.

Mr. RENNINGER. If your Honor please, I think I just have about three or four more questions that I would like to ask and we will be through with Mr. Martin.

The COURT. You have had the witness now since 12:05 p. m., according to my notes. Go on.

By Mr. RENNINGER:

Q. Mr. Martin, do you sell any cellophane or any other material that has not been converted by you to any great extent, outside of minor sales? In other words, you are a converter of cellophane?

A. Yes, we are a converter of cellophane.

Q. And you are in the converting business?

A. Yes, sir.

Q. And you sell any type of printed wrapper that a particular customer of yours desires, isn't that true?

A. Yes; if they desire a certain wrapper and if we can make it, we sell it to them.

Q. And your principal competitors are whom?

A. Well, it all depends on the product. If you are talking about cellophane, our principal competitor is Dobeckmun and Milprint—they are our principal cellophane competitors.

9383 If you are talking about laminated foil, then we have other competitors.

Q. But your competitors are all converters, are they not?

A. Yes, I would call them converters.

Q. And your ability to sell a wrapper depends in the last analysis upon your ability to do a better print job or to make a better bag, or something of that nature, isn't that true?

A. Well, it is on our ability to furnish a better product for as good a price or better a price than our competitor.

Mr. RENNINGER. That is all.

Mr. MCGLOTHLIN. I would like to offer Defendant's Exhibit 1003. Those are the samples we marked for identification.

(Group of samples of wrappers of the Shellmar Products Company, previously marked "Defendant's Exhibit No. 1003 for Identification" were marked "Defendant's Exhibit No. 1003".)

Redirect examination by Mr. MCGLOTHLIN:

Q. Mr. Martin, as I heard your figures on the amount of material purchased, were those figures you gave us in dollar purchases or pound purchases?

A. Well, one part was dollars and one was pounds.

9384 Q. Would you tell us which was which?

A. You see, it is pretty hard. I gave you a figure of $16,383,000——

Q. That is for cellophane?

A. Well, they have a notation in here in parentheses, in small type "including minor amounts of acetate, Kodapak and pliofilm". Now, "minor amounts", I don't know how much that is. Under-

neath that they have, cellophane miscellaneous laminations of $181,000. Now, that is dollars. But when I was giving you the figures of what I purchased from Sylvania and du Pont and Oil, and from customers, that was pounds.

Q. As I heard the figures, Mr. Martin—I haven't totaled them—it seemed to me that whereas your 1951 sales of cellophane, you told us were about fifty per cent——

A. That is right.

Q. —— of the total Shellmar flexible packaging division, your purchases during 1951 were more than 50 per cent cellophane as compared to other flexible packaging materials?

A. Yes.

Q. Will you explain how that happened?

A. It is very simple. You see, I gave you my purchases but when we got to the end of the year we have to carry on the floor tons and tons of material. So it happened when I hit Janu-

9385 ary 1 I had about three or four months inventory there. I didn't want it, but the business started to slough off and I found myself sitting with a whole lot of inventory of cellophane, foil and everything else. So the difference between the inventory that we carry, which is much too large, and the difference in these figures is what makes the difference. I think you will find that is what it is.

Q. You were shown a letter marked for identification as GX 5564 in 1940 in which you protested against the discontinuance of the quantity discount?

A. Yes.

Q. Have you ever received a quantity discount from du Pont on cellophane since that time?

A. No. They never went back to the quantity discount.

Q. Do you do printing of glassine?

A. Yes, sir.

Q. Do glassine producers also print glassine?

A. Some of them—very few. There is one that I know of that does.

Q. Who is that?

A. Riegel Paper Company.

Q. Do you consider them a converter?

A. Yes, they are a converter in glassine, and they make the glassine themselves.

9386 Q. In the list of operations you performed, you mentioned coating. Do you mean to include by that waxing of paper as well? Do you do waxing?

A. Very little waxing. It is most all coating.

Q. Who does the waxing of the wax paper that is sold?

A. Who does the waxing?

Q. Yes. Name a company or so that does waxing.

A. We can do our own waxing, and then we can have waxing done by a wax company. We print a part of the Wrigley wrap, and then Wrigley when they put the foil on they put it on themselves, and they put a coating of wax on at the time they wrap the gum.

Q. Do you know of a company called Nashua?

A. Yes.

Q. Is that a waxing converter?

A. Yes, and they are a cellophane converter.

Q. How about a company called Marathon?

A. Yes, they are waxers and they are cellophane converters. They are mostly wax paper printers.

Q. You told us that during the war you used Sylvania film for gas capes?

A. Yes.

Q. Did you also use it for other purposes, packaging purposes?

A. Yes.

9387 Q. You were asked about the heat sealing qualities of various materials. Does PT cellophane heat seal?

A. No.

Q. Does MT cellophane heat seal?

A. Yes.

Q. Do you use an adhesive with the MT?

A. Sometimes. On that coffee package we do because we want to give it added strength. We don't feel that the heat seal offered by the MT is enough to make a good safe package.

Q. Do you have sufficient cellophane today?

A. Yes, you bet we have. It is running out of our ears.

Q. You told us that you went into the conversion of cellophane because it was a new product that you thought offered opportunity, I believe?

A. That's right.

Q. Why didn't you continue converting only cellophane? Why did you start converting other things?

A. Because, as we got into packages and got into learning more about packages and the protective qualities that were required in packages, we found out that we had to convert to these other things in order to call ourselves a packaging engineer house and to turn out the kind of a package that the product would require.

9388 Q. You told us some instances in the past where cellophane had lost business to other products?

A. Yes.

Q. And where cellophane has taken business from other products?

A. Yes.

Q. Does that process continue today?

A. All the time. We are losing cellophane every day and we are picking it up every day. It just keeps changing all the time.

Mr. McGLOTHLIN. That's all.

Mr. RENNINGER. No further questions.

(Witness excused.)

Mr. McGLOTHLIN. I call Mr. Ralph Russell.

RALPH C. RUSSELL was called as a witness, and being duly sworn according to law, testified as follows:

Mr. GESELL. Your Honor, Mr. Russell is from out of town. He has been here some time. He is going to be a short witness. Has the Court any disposition to sit to 4:30? I think we might be able to send him back on his way.

The COURT. All right.

Mr. McGLOTHLIN. If your Honor please, Mr. Russell is General Sales Manager of Hayssen Manufacturing Company, one of the world's largest manufacturers of wrapping machines.

9389 You may remember having seen one of the Hayssen wrapping machines at the Packaging Exposition bundling six little packages of ice cream.

For many years Mr. Russell was a du Pont mechanical engineer in machinery matters with cellophane. He will testify as to the use of cellophane on machinery and as to the development of machines using cellophane.

He appears by subpoena.

Direct examination by Mr. McGLOTHLIN.

Q. Give your full name, please.

A. Ralph Clinton Russell.

Q. What has been your profession throughout your life?

A. Mechanical engineer and packaging engineer.

Q. What is your present position?

A. General Sales Manager of the Hayssen Manufacturing Company, Sheboygan, Wisconsin.

Q. How long have you been with Hayssen?

A. A little over half a year.

Q. Where were you before that time?

A. Eight years with the Oliver Machinery Company, in Grand Rapids, Michigan.

Q. In what capacity?

A. General sales manager of the packaging division.

Q. When did you come to du Pont for the first time?

9390 A. In March of 1931.

Q. How long did you stay?

A. Approximately 13 years, until July of 1943.

Q. Was that the time that you went to Oliver?

A. Yes.

Q. Will you tell us what is the status of Hayssen Manufacturing Company as a manufacturer of wrapping machines?

A. As we conceive the manufacture of wrapping machines, we consider ourselves to be approximately second largest in the world.

Q. Whom do you consider to be the largest?

A. We feel that Package Machine Company of Springfield, Massachusetts, is probably the largest.

Q. Of the machines you make, what proportion are designed for wrapping packages in consumer unit size?

A. I would say possibly somewhere between 80 and 90 per cent.

Q. And the remainder are such bundling machines as were at the Packaging Show?

A. Yes; miscellaneous bundling, or protective packaging during transit or shipment.

Q. How many of your machines use a roll feed as opposed to a sheet feed?

A. All of our wrapping machines use roll feed.

Q. How much of your output is designed for heat sealing?

9391 A. Heat sealing alone?

Q. No. First, do all your machines have the capacity of heat sealing?

A. Practically all, yes.

Q. Referring for a minute to the machine that was at the Packaging Show, what is the material that is normally used on that machine?

A. Kraft paper.

Q. Why was cellophane used at the Show?

A. Simply to show the prospects and customers what was inside of the package. In other words, eight packages of ice cream, or eight pints of ice cream.

Q. What speed does that machine run?

A. You are speaking of the bundling machine that was at the Show?

Q. Yes.

A. The machine was geared down to approximately ten per minute to take care of a filling machine speed of approximately 80 per minute.

Q. Turning to your wrapping machine, such as a bread wrapping machine, what is the rated speed of your machines in that operation?

A. It ranges between 35 and 45, and sometimes 50 per minute.

Q. Is there a group of materials that all Hayssen machines will handle without attachments?

9392 A. The majority of our machines are what we call our Class A standard machines, and as they are normally sold

to the trade they just automatically handle several different types of materials.

Q. Can you tell us what the materials are?

A. The oldest and basic would be wax paper, waxed glassine of the various weights and gauges, lacquered glassine having a lacquer type heat seal, and various types of heat sealing cellophane.

Q. Do they also handle any type of foil?

A. Foil which has been specially prepared with a heat seal back-up paper, and lacquer.

Q. Do you make one line of machines which has the heating elements fixed in place, fixed heaters?

A. That is standard practice on our regular machine, Class A machines.

Q. That machine will handle interchangeably the materials you have just stated?

A. Yes.

Q. What is the approximate cost of that machine?

A. Base prices start at approximately $3,000.

Q. Does Hayssen have an attachment for the machine which will permit the use of adhesives?

A. Yes sir.

9393 Q. What does that cost?

A. I would like to break that down into two parts. The simplest type of mechanism is called solvent applicators, as might be used for certain films, such as cellulose acetate, MT cellophane, which run around $850.00, and a slightly more complicated type for Kraft papers and other types of wrapping materials requiring adhesives, at around $1,750.00.

Q. Taking the $1,750 attachment on your fixed heater machine, when you add this adhesive attachment what additional materials can then be run on the machine?

A. With the full adhesive attachments, almost any wrapping material, such as Kraft, sulphites, heat sealing wax papers, heat sealing glassine, heat sealing cellophane, and so forth.

Q. How about plain glassine?

A. Plain glassine is, of course, included with any paper requiring normal adhesives.

Q. Vegetable parchments; would that work?

A. Yes sir.

Q. Sulphite paper?

A. Yes sir.

Q. Still with this machine, suppose the machine is being run on wax paper, or waxed glassine, and the operator decides to change to heat sealing cellophane. Will you tell

9394 us the extent of the work and adjustment that has to be done to change over?

A. I would say very little work. The work mainly consists of a quick cleaning of any residual waxes on the folders of the machine. Naturally, the roll of material must itself be changed, and I would consider then that the change has been completed.

Q. Is that, from your experience, a change that requires the services of a skilled mechanic, or who normally makes such changes?

A. Most frequently on our machines girls make the changes.

Q. Just the operator?

A. The operator, unskilled labor.

Q. Does your company also make a type of wrapping machine in which the heating elements are reciprocating in the sense that they move in and touch the material and move back out again?

A. Yes sir.

Q. How much does that one cost?

A. That would add about $1,000 more to the entire machine.

Q. Let's take that machine. Would it handle the materials that you have described so far?

A. Yes sir.

9395 Q. What additional materials would it handle?

A. The regular reciprocating heaters, both sides and bottom, will also handle, in addition to the previously named materials, pliofilm. A further modification of the reciprocating side and bottom heaters will go one step farther and handle films such as polyethylene, in addition to all of the previously named film.

Q. The machine with the reciprocating element can also be equipped with the heating attachment?

A. Yes.

Q. And so equipped will handle all the materials that are heat sealing, plus all that are fastened by adhesive, is that correct?

A. Yes sir.

Q. Now, will you tell me why Hayssen designs machines so they will use three or more materials, instead of designing machines to use just one?

A. We feel that the more advantages that we can offer the prospective purchaser of machines, the more machines he will buy. He is buying, actually, in addition to a machine, a sort of insurance for the future. No man likes to buy a machine that can only do one little thing.

Q. You spoke of insurance for the future. What did you mean by that?

9396 A. Using the flexibility. If he wishes to change from one wrapping material to another, next week or next month, he already has the capital equipment, the capital investment in his equipment, ready to go.

Q. Suppose on your machines that are equipped with an adhesive attachment you decide to change from such a material as MST cellophane, which is heat sealing, to, let's say, plain glassine, which is adhesive sealing, will you describe the changes that have to be made for that shift?

A. The machine is equipped with adhesive attachment?

Q. Yes.

A. It simply would be a matter of pouring in the proper adhesives, changing the rolls of material, and possibly, with the automatic bulb type thermostats with which all of our machines are equipped, cutting down the heat slightly, and proceed to run.

Q. In the operation of the machine, who normally makes those changes?

A. Semi-skilled operators.

Q. In your experience, to what extent are flexible packaging materials actually used interchangeably by customers on Hayssen machines?

A. It is hard to measure that, but we find quite a bit of it.

9397 Our daily correspondence is filled with requests from customers who are going to bring out a new size of package, or may decide to bring out this new package or other type of wrapping material, and we've got to know about it that way. Otherwise, we have no knowledge when we bring out a wrapping machine, and many times no official knowledge whatsoever of what kind of heat sealing wrapping material is going to be used on our equipment.

Q. Have you found in your experience, say in bakeries, that a bakery will sometimes use one of your machines for two materials interchangeably?

A. Oh, yes, two or more.

Q. What are the important qualities of a flexible packaging material for use on an automatic packaging machine?

A. To get an optimum result, we like to see a roll of material that has been carefully wound, carefully slit, a sheet which is flat and tends to stay flat, without excessive curl, without excessive static conditions, and with those mechanical factors in mind the materials should run in a satisfactory manner.

9398 Q. Is there any relationship between the need for quality and the speed of the machine?

A. If I could make a general rule on that, in my past experience——

Mr. MINICUS. How is that relevant to this monopoly case, your Honor?

The COURT. I am not getting it.

Mr. MCGLOTHLIN. It has this relevance, your Honor. There is some testimony that in band applications Sylvania film operates

quite satisfactorily, as satisfactory as du Pont. There is now also testimony by Mr. Martin, among others, that on his high speed machinery he finds du Pont film works better.

What I am establishing the quality requirements of the machine type of operation as against the hand type of operation.

The COURT. Very well.

The WITNESS. Will you repeat the question?

(The reporter read the testimony as follows:

"Question: Is there any relationship between the need for quality and the speed of the machine?

"Answer: If I could make a general rule on that, in my past experience——")

The WITNESS. (*Continuing.*)——the higher the speed of the machine the greater the demand for top quality. The two go hand in hand.

9399 By Mr. MCGLOTHLIN:

Q. Has foreign cellophane ever been tried on Hayssen machines?

A. Yes.

Q. When was that?

A. Within the past two years.

Q. How did it run?

A. I would hate to use the word "impossible", but that practically describes it. If I might further identify the foreign film——

Q. Yes, go ahead.

A. The particular film I have in mind was a French import.

Q. Now, when a customer using a Hayssen machine from your experience decides to change his wrapping material from cellophane to something else, how long does it take him to make the changeover after he makes up his mind? Take the case, for instance, of the average size baker?

A. That would depend to a large degree on his current inventory of the one material. With an unprinted material it is normal to keep a very low inventory. Therefore his change might be very rapid from one to the other. It might be thirty days or less depending on the efficiency and ability of his printer or supplier. It is only a question primarily of what he has on hand and which material he wants to use up.

9400 Q. Is the period you have given equally applicable to a change from another material to cellophane?

A. I didn't hear that question.

Q. You gave us a period of approximately thirty days, I believe, when a man decided to go from cellophane to another material?

A. Yes.

Q. Would you say the same applies when he decided from another material to cellophane?

A. There would be really no difference, unless some complications were brought into the picture by a printer who might require time to make plates, and so forth.

Q. From the standpoint of your company, Mr. Russell, are the people in the packaging field who use flexible packaging a different group than use tin cans and rigid packages?

Mr. MINICUS. What is the materiality of that question, your Honor, if it can't be established? I must object to it.

Mr. MCGLOTHLIN. How can it be established unless he answers?

The COURT. What is the purport of the question?

Mr. MCGLOTHLIN. Your Honor, our position is that there is essentially a flexible packaging market. The Government apparently is taking the position that there is no such thing. It
9401 is either a cellophane market or it is all packaging. Now here is a man who has had long experience in the packaging field. I want to find out what his experience was as to that.

Mr. MINICUS. We never denied that all of these materials they are talking about work on machines when they wrap packages, and, probably, as the witness testified, you can use the same machine after some minor adjustments for various materials. There is no dispute about that. If you are going to use wax paper to wrap, you have got to do it on a machine, I suppose.

The COURT. I am going to allow the question.

The WITNESS. Would you repeat the question please.

(The reporter read the question as follows:

"Question: From the standpoint of your company, Mr. Russell, are the people in the packaging field who use flexible packaging a different group than use tin cans and rigid packages?")

The WITNESS. In general, I would say yes. There may be some exceptions, large organizations such as General Foods, who have various divisions using coffee cans and at the same time putting up frozen foods and things like that in flexible packaging materials.

Q. From the standpoint of your experience, Mr. Russell, and from the standpoint of your company, are the customers who use cellophane on your machines for packaging a different group
9402 of people than those who use other materials on your machines?

A. No, sir.

Q. Taking as an example the textile market, would you tell us what materials are used on your machines for flexible packaging in that market?

A. In the textile industry, it will range all the way from an ordinary blue Kraft paper through some of the transparent films,

such as cellophane, pliofilm, polyethylene, and including completely opaque wrappers today which are combinations of polyethylene and paper, both laminates and also spray coatings—all are used on our machines in the textile industry.

Mr. McGLOTHLIN. Your Honor, I am about to change to a different phase.

The COURT. All right, adjourn court until tomorrow morning at 10:00 o'clock.

(At this point the trial was adjourned until Friday, April 18, 1952, at 10:00 o'clock a. m.)

9403 FRIDAY, APRIL 18, 1952, 10:00 O'CLOCK A. M.

Present: As before noted.

RALPH C. RUSSELL (Resuming).

DIRECT EXAMINATION (CONT.)

Mr. McGLOTHLIN. Your Honor, we have marked the various samples as 1003. [Envelope handed to Court.]

By Mr. McGLOTHLIN:

Q. Mr. Russell, you told us yesterday you spent your entire life as a mechanical engineer. Had you done so before you came to du Pont?

A. Yes, sir.

Q. And when you came to du Pont, to what section of the organization were you attached?

A. In those days, the early part of 1931, it was called the Engineering Service, which was a part of technical service attached to the sales department, cellophane division.

Q. Of the Cellophane Company?

A. We did not know it as the Cellophane Company. We called it the cellophane division of the rayon department.

Q. Were there any other mechanical engineers engaged in the same sort of work you were in?

A. One man preceded me, and within the year our work expanded to the point of where two additional men were added and within a year later our force was increased to five

9404 mechanical engineers.

Q. Now, at that time how much cellophane was applied as a hand operation as opposed to a mechanical operation?

A. In 1931 we were under the impression from figures that were gleaned from sales broken down, approximately 90 per cent of our entire production went into cut-to-size sheets. The balance was used in rolls on what few machines were available at that time.

Q. Well, now, were other materials being used on wrapping machines at that time?

A. Yes, sir.

Q. What materials were being used?

A. Well, in the baking industry, of course, wax paper, waxed glassine was used predominantly, dry glassines were being used, and of course in miscellaneous operations such as bundling and what not ordinary sulphite printing papers, kraft papers, etc.

Q. Was any foil being used on machines at the time?

A. Yes, on cigarette machines and on cigar machines.

Q. Now, what was the job of you and the section with which you were working? What were you supposed to do?

A. Our duties were basically two-fold, first, to assist our customers wherever possible in the proper choice and the selection of machines to assist them in converting their present machines and to work closely and diligently with machinery manufacturers.

9405 Q. What was the purpose of the work with machinery manufacturers?

A. The purpose of working with machinery manufacturers, was, first, to show them how their machines could be converted to use in addition to the regular materials which were in use, to also use cellophane, and to bring to them all facts, information, data, and so forth, that would assist them in selling and servicing their customers.

Q. Did you have anything to do with the start of a collection of data on various packaging machines available that would use cellophane?

A. Well, the first time to my knowledge in the history of the packaging field—I am referring particularly to flexible wrapping materials—we put together a technical data and machine information book, the first of its kind ever known in the industry.

Q. And what use was done with it? What was the purpose of that? How was it used?

A. The purpose of that book was to put in the hands of all du Pont cellophane representatives complete data on available wrapping and packaging equipment and thence for transmission to their customers.

9406 Q. To your knowledge, was it so used?

A. It certainly was.

Q. You left Dupont in 1943; is that correct?

A. That is correct.

Q. As of that time was such application still being used by salesmen?

A. Yes. We undertook a very extensive revision of the entire book in the latter part of 1940.

Q. When you began working with package machinery engineers as a Dupont representative, to what extent did you run into similar representatives from producers of other packaging materials?

A. The entire effort of our engineering service, undoubtedly conceived in far bigger and better minds than mine, was without parallel in the industry. Wrapping machine manufacturers, as such, had never known of other wrapping materials nor did they go to the lengths that our department in our company went to to work with them and assist them in a factual and practical manner.

Q. When you went in there were you uniformly welcomed in the packaging machinery manufacturers?

A. Not exactly. It took a bit of selling. Generally speaking, manufacturers don't welcome the idea of strangers walking into
9407 their engineering departments and studying their drawings and working with their engineers. But in a short time, I am happy to say, we sold them a bill of goods to the point where the doors were always open to us.

Q. Going up in years to the development of heat sealing cellophane at that time, which was approximately 1933, was it not?

A. 1932 I had my first roll of M. S. T. heat sealing cellophane in my hands.

Q. What was the most important wrapping machine in the trade?

A. As to make and model?

Q. Who made it?

A. The American Machine and Foundry Company of Brooklyn, N. Y.

Q. Would that machine use heat sealing cellophane as it then was?

A. No.

Q. What was the second most popular machine of the trade?

A. The Hayssen.

Q. Would that machine, as it then was, use heat sealing cellophane?

A. No, sir.

Q. Were you able or was your section able through your efforts to have those machines adapted so they would use heat-sealing cellophane?

A. After a lot of trial and tribulations and sweating
9408 it out in bakeries stripped down to my waist—I will never forget it for the rest of my life—the Fisher Baking Company in Newark, New Jersey, in August 1932 were fighting the machine in their effort to produce a commercial package.

Q. Once you had the machine to work some of the machines could be adapted to use moistureproof heat-sealing cellophane for

bread wrapping, did that end your concern with the use of heat-sealing cellophane for bread wrapping from a machine standpoint?

A. No, sir, it was necessary to carry the Gospel or carry the techniques learned in the initial stages to customers all over the country. In those days, in my office in the Empire State Building, I always had a packaged bag on my desk and for a period of approximately three years I never knew when a phone call might come in from Texas or Minneapolis where some baker had started and found himself in trouble and needed help.

Q. Why do you say you worked on adapting a heat sealing machine for the wrapping of bread rather than trying to get the machinery manufacturers to build a machine specifically for cellophane?

A. It wasn't considered economically sound particularly in the early thirties to ask the prospective customer to enter into the heavy capital investment for new bread wrapping machines, if such were available and they weren't available. The effort was to find existing machines cheaply and at a price or at
9409 a low cost which would be of no consequence to the customer.

Q. Did Dupont actually pay for the expense of changing customers' machines?

A. No, sir.

Q. Did you have any contacts with a man named Rene Goubert?

A. He is a dear and personal friend of mine.

Q. What was the nature of your contact with him?

A. In the beginning of my acquaintanceship with Rene Goubert, which was in New York in 1932, Mr. Goubert had a very attractive, inexpensive and simple pie and caking wrapping device. That started our association. We worked closely together and I collaborated with him in the techniques we already learned with heat-sealing cellophane to the point of where Mr. Goubert formed the Simplex Wrapping Machine Company of Oakland, California, and produced for the market a very practical, inexpensive bag making machine to handle heat-sealing cellophane.

Q. Is that what is known as the Simplex Bag Machine?

A. That is.

Q. Will you tell us the status of the Simplex Bag Machine is in its field today?

A. I don't think the status of the machine has changed particularly in the last ten years.

Q. Is it a leading machine or a minor machine?

9410 A. For manufacturers producing, let us say, for instance, a food product, I would say it is still the most popular bag making machine.

Q. Did you, as a Dupont representative, contribute anything specifically to the design of that machine?

A. Yes, in a number of items.

Q. Would you give us one or two of them?

A. Probably the greatest point of trouble on the original Simplex machine was the idea of making bags in such fashion, the difficulty in obtaining a clean, continuous seal on the long seal and end flaps of the cellophane. Through some experiments in our department, engineering service, we had determined to our satisfaction that a resilient backup when heat and pressure through metallic heat was applied was practically the secret of success, something that Mr. Goubert hadn't run into himself. We like to think today that was one of the basic reasons for the success of the machine requiring no adhesives whatsoever and obtaining a very tight and continuous seal.

Q. You told us of your experience when customers ran into trouble using cellophane. Was all of your work with customers the result of complaint?

A. No, sir.

Q. In what other way would you consult with customers?

A. Wherever the A salesmen, attempting to sell cellophane, found some existing machine or some possibility where
9411 an engineering and consulting service could be used to good advantage, he called upon us to come out into the field and work with him and attempt through that means to help out the customer, give him good advice and hopefully obtain some of his business.

9412 Q. Now, in giving service to machine users to what extent did you and your section draw a distinction between users who were using only du Pont cellophane and users who were using partially du Pont cellophane and partially Sylvania cellophane?

A. From a practical standpoint no distinction was ever drawn.

Q. How about between a large customer and a small customer?

A. No distinction was ever drawn.

Q. As a matter of fact, to which class of customers between large and small did you give the greater assistance, would you say?

A. Well, at the end of the year we add it all up in hours and therefore, there were more small customers than large customers.

Q. Did you make a distinction in your service between a man who was using cellophane and a man you were trying to persuade to use cellophane?

A. No. In fact, we practically worked harder on the one we were trying to persuade, if there was any distinction.

Q. After you got to the point where cellophane would work to

some extent on a particular machine, was any further work done to improve efficiency of the use of cellophane?

A. Well, our work was continuous in that respect. We worked continuously with the machinery manufacturers in
9413 an effort to continuously improve the mechanisms, design entirely new machines in some cases, and in fact some of the most popular wrapping machines available on the American market today can be traced directly to the mutual efforts of the engineering service department of du Pont and machinery manufacturers themselves.

Q. Mr. Russell, let's take the case in which you are working on an existing machine and by such joint efforts you increase the speed of the machine for using cellophane, what effect does that have on the machine's ability to use other wrapping materials?

A. Well, I wouldn't want to put it exactly on the point of speed. I would like to explain it another way, if I may.

In engineering work, in building an improvement on an existing machine and specifically in this case on wrapping machines, it was always found, practically without exception, that previously well known materials consequently ran better, more efficiently, and, as you indicated, sometimes at higher speeds.

It could be a corollary or comparison to improvements made in automobiles, as time goes on, better shock absorbers, and so, on, give you a better ride on the old rough roads just as well as they give you a better ride on the new super-highways.

Q. Mr. Russell, did you have any part in the mechanization of the production of soft cake?

9414 A. Yes, I think I did.

Q. Was there a time when soft cake largely was not produced mechanically?

A. Yes, not so long ago.

Q. What was the problem that was stopping mechanical production of soft cake, the mechanical problem?

A. The basic problem of preventing the mechanization of soft cake wrapping in any kind of wrapping material was, number one, the delicacy of the product itself and, number two, the tremendous variety of sizes and shapes current in the soft cake wholesale industry.

Q. What did you do about it? What did you contribute to the mechanization?

A. That is a rather involved story, but my attention was drawn to the situation, as any engineer's attention might be drawn to a similar situation, in my work with the bread bakers. It was perfectly obvious that machines were sadly lacking in the soft cake field which in many cases were adjacent to or a part of the bread bakers organization.

Then followed a series of studies, some of a very formal nature, in an effort to get facts and figures which would be of interest to machinery manufacturers, followed by a drawn out effort with machinery manufacturers then in existence to attempt to sell them on the idea of this beautiful market which was right at their doorsteps.

9415 That met with a lot of discouragements, and the largest wrapping machinery manufacturers in the country didn't think too well of the idea. They had always known that the cake was there, but they had thrown up their hands and never dared to attempt the problem.

Q. Did you eventually find a machinery manufacturer who was able to develop a satisfactory machine?

A. Yes, we found a manufacturer old in business but young in the wrapping machine field which evidently didn't know it couldn't be done. They didn't have any of the fences built up around the problem. And I found them relatively easy to sell to my way of thinking.

Q. Did you work with them in the development of the machine?

A. Very closely. We practically redesigned the machine for them.

Q. Now, in your studies of the soft cake problem was it confined to the wrapping machine itself or did you go beyond that into the economics of the industry?

A. We [illegible] the early stages of the problem were mainly concerned with wrapping machines, but as we grew up into the picture we expanded that operation into an overall engineering consulting service which would go so far as to lay out the complete finishing area of a bakery, floor plans, automatic conveyer systems, elevators, etc., to bring the desired result of more or less complete

9416 mechanization to a baby industry.

Q. Has soft cake production and sale grown since that time?

A. Very appreciably.

Q. Has some cellophane been sold for wrapping soft cake?

A. A considerable quantity, I would imagine.

Q. Has all soft cake been wrapped in cellophane?

A. No, sir.

Mr. McGLOTHLIN. Your witness.

Mr. MINICUS. We have no questions, your Honor.

Mr. GESELL. We call Mr. Smith.

WILFRED WINTER SMITH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Mr. GESELL. If your Honor please, Dr. Smith is going to be the patent witness in this case. His testimony will be directed to

several specific paragraphs of the complaint as well as to some of the other contentions in the case. Particularly he will deal with issues raised by paragraph 28, paragraph 33 (a), paragraph 33 (e) of the complaint, 28 dealing broadly with the so-called monopolization of patents, 33 (a) with issues of non-use and monopolization, and 33 (e) with the settlement of the interferences.

The Court will recall that at some time back it took judi-
9417 cial notice of the patents at page 2332 of the transcript, and I think there will be occasion perhaps to refer to some of those patents in the course of Dr. Smith's examination, and certainly there will be occasion to refer in some detail to the answer to the patent interrogatories, Government Exhibit 2001 and 2001-A, which the Court may recall were consolidated for the convenience of all the parties and which are contained in a special consolidated booklet.

I took the liberty, Mr. Clerk, of piling that material on the top of the shelf over there in case the Court has occasion to look at it.

Dr. Smith is employed by du Pont, your Honor, and he has worked in a supervisory capacity in the Patent Service Section of the du Pont Cellophane Company and later the Rayon Department and has had particular responsibility for matters affecting cellophane patents during a period from 1931 to 1950.

He is going to concentrate on du Pont's policies and practices in the taking out of patents, continuing along the line of testimony that started with Dr. Mitchell. He will deal with the acquisition of patents, with some aspects of du Pont's patent relations with Sylvania, with the patent interferences, and he will also cover certain statistical matters. The emphasis of his testimony throughout is going to be with respect to moistureproof cellophane.

9418 Direct examination by Mr. GESELL:

Q. Dr. Smith, what is your full name?

A. Wilfred Winter Smith.

Q. Where did you receive your college and graduate training, Dr. Smith?

A. Yale University.

Q. What degree do you hold?

A. Bachelor of Science in chemistry and Doctor of Philosophy in chemistry.

Q. Are you a member of any professional societies?

A. The American Chemical Society.

Q. After your graduate training what was your first job?

A. With du Pont as a research chemist.

Q. When did you start to work with du Pont?

A. In 1929, July 1.

Q. When did your duties first bring you into contact with cellophane?

A. 1931, in August.

Q. And from that time on how long were you concerned in one way or another with cellophane patent matters, would you say?

A. Until 1950.

9419 Q. In what capacities did you act during that period from 1931 to 1950?

A. I was a member of the Patent Service Organization and my first responsibility in that group was to consider all patent matters relating to cellophane in a technical sense, adviser to our patent counsel and adviser to the management.

Q. And did you ultimately become chief of the Patent Service Section?

A. Yes, I did.

Q. When was that?

A. In 1946.

Q. What was the occasion of your losing touch with cellophane in 1950?

A. Well, at that time the f mer cellophane division of the Rayon Department was conver 1 to the film department of the Dupont Company and with that separate organization the responsibility for cellophane patent matters became a part of the duties of that department rather than the Rayon Department.

Q. And you continued with the Rayon Department?

A. I continued with the Rayon Department activities.

Q. Now, during the period that you were in the Patent Service organization of the Cellophane Company and then of the Rayon Department concerned with Cellophane, can you tell us what the functions of that section were? What were its duties

9420 in a general way?

A. Well, I think generally the first duty was the maintenance of a patent library of currently issued patents, domestic and foreign, to guard against the possible infringement of patents of others. Our next general responsibility was to keep in touch with research activities, plant operations and prepare material for the securing of patents billetted to those researchers.

Our next responsibility, I think, was to help the management in the administration of any license agreements, any agreements that related to patent matters in so far as the patent aspects were concerned. I guess the rest of our responsibility was—I shouldn't say I guess—the rest of our patent responsibility was various delegated responsibilities by the management.

Q. To what extent did your duties require you to be familiar with the actual methods of making cellophane and patents for

processes for their operation, the way the plants functioned in matters of that kind?

A. We were expected to be very familiar with everything that went on. We maintained various contacts with the research people by personal contact, by reading reports, by visiting the research laboratories, by visiting the plant sites and we were kept informed by one means or another of practically everything that went on.

9421 Q. Now, who is your chief in the period before you became head of the Patent Service Section?

A. Mr. F. M. Prall. Perhaps I ought to explain that some of the earlier correspondence might show his name is Pralatowski. He officially changed his name in 1940 or 1941 to Prall.

Q. Is he alive or dead?

A. He is dead.

Q. The question was raised by the Court and has come up once or twice in the discussion of some of the documents as to what the precise procedures are within the Dupont Company for taking out a patent, and I want to trace through those procedures with you for the purpose of showing what you had to do with it and also for the purpose of showing how it was done.

For that purpose, as a means of sort of tracing it through, I want to ask you to assume that Dr. Mitchell, who preceded you on the stand, had sent along to you as a result of his research observations what he called a patent proposal or a patent proposal letter—let us say it is on a moistureproof coating—and I want to trace what happened in the organization to such a proposal as it came up from Dr. Mitchell or from anyone else in the research organization. Am I correct in understanding that such a proposal would, at the outset be directed to you?

A. Yes.

9422 Q. Now, in a general way, what would be the nature of the information that such a proposal would contain?

A. Such a proposal would contain a brief outline of what the research man had done that he considered was novel. He would outline enough experimental data to earmark the subject matter clearly. He would include a discussion of who was involved in bringing the thing into being, approximately what dates were involved, the probable utility of the idea and any background information that he might have. If he didn't make any searches or if he happened to know something from the literature or patent literature, he would append what he knew about it.

Q. When you received, or the Patent Service Section received such a proposal, what was done with it at the outset?

A. At the outset I would receive it and pass it on to the man in the patent service organization primarily responsible for the

handling of cellophane matters. You realize we handled the matters for the entire department and there were other matters to be considered.

That patent service man would examine it, if he had time, perhaps make some preliminary looks through our patent literature files, perhaps he would talk with the research man informally or perhaps he would put it on the corner of his desk as a deferred matter awaiting the next Patent Steering Committee meeting for that particular research group.

9423 Q. What is the Patent Steering Committee?

A. The Patent Steering Committee was an advisory committee organized at the behest of Patent Service to coordinate the activities of Patent Service with the research people.

Q. Who would be the members of that Patent Service Committee?

A. On the research side of the picture the Research Director and/or his assistant and any other of his staff, research managers, research supervisors or research chemists who might be called in on specific occasions. On the patent side the head of the Patent Service and his assistant, optionally, and the patent service man concerned with that research subject. There was a Patent Steering Committee for each research section.

Q. How many steering committees within this rayon-cellophane area you were working in were there?

A. One in the cellophane area.

Q. How many for the whole series of products?

A. Four more, I believe.

Q. This was one of five groups?

A. One of five Patent Steering Committees.

Q. And the meeting would include five or six people, I gather, from what you say?

A. Yes, the committee meetings were not formal and we would bring into the discussion anyone in the research organization who could shed any light on the subject before the group.

9424 Q. Did you meet on a prepared agenda?

A. Yes. In order to facilitate our discussion of items the Patent Service would release about two weeks before the schedule time for meeting a program of items to be discussed.

Q. How frequently did you say this cellophane patent service committee met?

A. When we first organized the committee it met once a month. That was too often. The wheels of progress didn't turn that fast. Eventually we settled down to a program of quarterly meetings of the Patent Steering Committee as a whole.

Q. Let us assume that a meeting of the Patent Steering Com-

mittee is coming along. What would happen to this patent proposal of Dr. Mitchell?

A. The patent service man preparing the program would include this item in the chapter of the program entitled New Items.

Q. I believe you said you attended those meetings, did you not?

A. Yes, I did.

Q. Will you tell us what kind of discussion took place at the meeting with respect to one of these new items as listed?

A. The item would be put on the table by the patent service man and the technical people involved would offer their comments as to the technical merits and the utility of it. Patent
9425 Service would ask whatever questions occurred to them at the moment. Sometimes they would be able to offer comments with regard to the prior art, if they had opportunity to look into that up to this time, and eventually the opinion would be gathered as to whether this was an item that would deserve attention for patent consideration.

Q. At that stage was it a fact that some of these proposals were abandoned and nothing further ever done to seek patents?

A. Yes.

Q. We are assuming a case that goes on through, so let us say as a result of that meeting it was decided that this was a proposal which deserved further attention. Will you tell us what would then happen to the proposal?

9426 A. The proposal would then be moved to what was termed the active list, which meant that Patent Service promised to do its best to move that item along before the next Patent Steering Committee meeting three months hence.

Q. Now, what sort of work was involved in moving along a proposal that was on the active list?

A. First was a search of the prior art to determine the definition of scope of any case that might be considered. There were frequent visits or communications between the Patent Service man and the research man involved to accumulate all the facts, to make sure of the distinctions between that research and the prior art which had been uncovered, and then the Patent Service man would prepare a draft of what we called a patent memorandum. In most instances it was framed in a fashion comparable to a patent specification. That was the easiest way to do it.

The story of the invention was told technically in that memorandum, the objectives and the utility and advantages of the invention. When that had been clearly defined often by repeated conferences with the research people, the case would be submitted to the patent attorney with specific instructions to prepare for filing a patent application based on this memorandum.

Q. Well, now, after the attorney prepared a draft, did the Patent Service Section have anything further to do with the item before the application was filed?

9427 A. Oh, yes.

Q. What happened next?

A. The attorney draft was returned to Patent Service and was reviewed by them, and of course by the inventor. Changes were frequently made. Of course by this time the attorney had appended claims to the specification and those were reviewed by Patent Service.

Q. When the application met the approval of the attorney and the inventor and the Patent Service Section, what happened to it?

A. The formal copies were presented by Patent Service to the inventor for execution and then submitted to the attorney for filing in the Patent Office.

Q. Who made the decision as to whether or not to file on a particular patent application?

A. Well, that decision rested with the Patent Service. The Patent Steering Committee was simply advisory.

Q. Was it necessary for Patent Service to advise any other body in the company when an application was filed?

A. Yes.

Q. Whom did you advise?

A. The Patent Board was informed after the fact of the filing of each United States patent application.

Q. Well, now, will you tell us what the Patent Board was, who its members were, what its organization was and how it was set up?

9428 A. Well, the Patent Board was and is composed of appointed representatives from each of the operating departments of the company, one representative each and an alternate, together with similar representatives from the Legal Department, the Chemical Department, Engineering Department and Foreign Relations Department. It acted as a clearing house or coordinating body with respect to patent matters within the company.

Q. By whom was it set up?

A. It was set up by the Executive Committee.

Q. Were you a member of the Patent Board?

A. Yes, I have been a member of the Patent Board since 1946. Prior to that time I was the alternate for Mr. Prall.

Q. Well, now, let's go along a bit further here and assume, first of all, that claims are allowed by the Patent Office and you receive notice of that; what step was taken in the company, if any, at that stage?

A. Well, at the same time that we reported filed applications

to the Patent Board, a list of allowed applications, allowances occurring since the last report, was appended, and approval was sought for payment of the final fee and issue of those allowed cases.

Q. Then we come along a step further. Suppose the patent issues and now Dr. Mitchell has a patent on a par-
9429 ticular moistureproof coating, following our example through, what was the function of Patent Service at that stage with respect to that issued patent?

A. Well, of course, we first reported to management that we had a new piece of property, told them about it, what its nature was. We also reported to management any consideration that should be given to that patent with respect to prior commitments of a license character, if there were any agreements that would require a license under that patent.

Q. Well, now, let's assume that at some later state, not at that state, but at some later state an application is made by someone to the company for a license under the Mitchell moistureproof coating patent, what did you have to do with that Patent Service?

A. Well, usually in the then rayon department the appearance of the word "patent" on a letter meant to refer it to the Patent Service, and therefore that letter would come to us.

Q. What would you do?

A. We would consider the patent, what its subject matter was, what our prior commitments might be, if any.

By the COURT:

Q. What do you mean by that? What are prior commit-
ments?

9430 A. Any license obligations that might have been required by earlier agreements, because if this request for license wanted an exclusive license and we already had a license granted, obviously we had to recognize that.

Then we would perhaps discuss the matter personally and subsequently by written memorandum with management as to what could possibly be done about it and often what our recommendation might be, because that patent very often had a bearing on a number of other patents.

Frequently a situation might arise where a request for license under one patent would of necessity require the granting of licenses under dominating patents, and that point had to be brought to the surface for the guidance of management in reaching its decision as to whether or not a license would be granted.

By Mr. GESELL:

Q. Let's assume you recognized that a license should be granted and management made the decision to license, what, if anything, did you have to do with the negotiation of the license?

A. Well, that depended on the case. Sometimes I was requested to negotiate with the licensee to discuss terms and perhaps come to some general form of agreement that might be acceptable to both parties.

Q. Who prepared the form of license agreement?

A. The Legal Department.

9431 Q. To what extent did you work with the lawyers in that regard?

A. Well, we cooperated very closely to try to be sure that the license grant would comprehend what we understood to be the intent of the parties, the wishes of the licensee which we tried to meet as often as we could and to whatever extent we could, and then when that license form was completed to the satisfaction of our management and to the reasonable satisfaction, as near as we could tell, of the licensee, then the agreement was submitted by the Patent Board member to the Patent Board for approval.

Q. Now, is that before the agreement or after the agreement was made?

A. That is before the agreement was made.

Q. And what was the function of the Patent Board in reviewing such a proposed license agreement?

A. Well, the Patent Board would consider the effect of such a license on its business activities, and it was required to recognize any adverse effects that might result. It also has to consider the overall effect of such an agreement on the company as a whole.

Q. What kind of a vote was required in the Patent Board before a license could be approved?

A. Well, at present, a unanimous approval is required. If—and this also applied to the older practice before the unani-

9432 mous approval was required—if there were dissenting parties, dissenting departments, the matter could be referred to the Executive Committee by the head of the department involved.

Q. Well, was there any requirement in the case of unanimous approval that the license go to the Executive Committee before the company made the commitment?

A. Yes. If the obligation to the du Pont Company or even the royalties receivable, if it were to be that kind of a license, exceeded a certain sum of money, the matter had to be and still has to be submitted to the Executive Committee for approval.

Q. Now, going back a way, let's assume that this patent application didn't have completely smooth sailing in the Patent Office and a patent officer interference had been declared before the patent issued, what if anything did you have to do in Patent Service with the handling of du Pont's interest in the patent interference proceeding?

A. Well, the first step, of course, was to prepare the necessary documents required by the Patent Office in a patent office proceeding, in order to stay in the interference and find out what the problem really is. The details of interference were left to Patent Service by management. We would secure the information necessary to prepare preliminary statements, the dates of invention, the reduction of practice, and so on. We would pre-
9433 pare memoranda regarding the technology involved to submit to the patent attorney for his use in replying to patent office procedures.

Q. Well, to what extent did you in Patent Service participate in the negotiations for settlement of patent interferences involving cellophane?

A. Well, if settlement was proposed either by du Pont or the other party, Patent Service would, if requested to do so by management, attempt to reach some ground of settlement agreement with the other party, establish what terms might be acceptable and thus arrange by settlement to shorten the period of litigation and avoid the time and expense of full litigation of the interference procedure.

9434 Q. Suppose you reach a settlement agreement settling an interference? Who had to approve of the agreement on behalf of Dupont?

A. Well, first, of course, the head of the department had to approve the agreement and beyond that the same approvals were required for that agreement as were required for any other license agreement.

Q. You mean by that it went to the patent board and the executive committee?

A. It went to the patent board and, if necessary, the executive committee.

Q. Dr. Smith, I wish you would tell us to what extent research proposals, patent proposals of the kind we discussed were turned down as a result of these procedures and no application for a cellophane patent filed?

A. That varies from year to year but over the long pull I think that we estimate that fifty per cent of the proposals will not make the grade. Sometimes it is more than fifty per cent.

Q. When you say will not make the grade, do you mean they were proposals that you did not apply for patent on?

A. We didn't consider that they were patentable and distinct from the prior art or that the technology involved was so lacking in utility or reasonable technical merit that we didn't feel it was worth our while to file a case.

9435 Q. To what extent in the cases where you applied for

patents were the patents that you applied for either abandoned because of patent office action or otherwise by yourselves?

A. Well, I think that our abandonments averaged over the years some ten to fifteen per cent. I know we were criticised at one time by the head of the patent division of the legal department because our abandonments were so low. He said, "You are screening your inventions too carefully. You ought to file more cases."

Q. We have in the documents, Dr. Smith, a large number of occasions heard the phrase "defensive patents." Do you recall that phrase appearing in some of the documents?

A. Yes.

Q. What did you understand by the term "defensive patents"?

A. A defensive patent in our thinking was the kind of patent which would protect our use of the invention. It was to defend our operations, the operations in the plant which would be expensive to replace or change.

We had invented that particular operation. We felt we were entitled to patent protection so that at least we could continue that operation in so far as that patent protection would afford that. That was the defensive patent.

There were some other patents that we might class as defensive patents where uses of our products were in-
9436 volved and that kind of patent was the kind we felt defended our sale of materials that those uses would be available to our customers.

Q. In your experience during this period did any occasions arise where Dupont was blocked from using the results of its own research development because it had not filed a patent application on the work and someone else came along later and patented it?

A. Yes, there were several instances of that sort. There weren't too many because I think if there had been we would have been criticised for not doing our job. But I recall two or three instances in the cellophane field that put us to some trouble because of that.

Q. In your experience, to your knowledge, from your participation in the meetings and discussions and activities you described, did Dupont ever apply for a patent for the purpose of blocking a competitor from practicising an alternative process or from using another invention for the manufacture or sale of plain or moistureproof cellophane?

Mr. MINICUS. I object to the question, your Honor. Every patent has that effect. That is the purpose of applying for a patent.

Q. Will you answer the question?

The COURT. I think this goes to the question of intent as to
9437 what was behind the policy of the defendant company.

Mr. MINICUS. Yes, sir.

By Mr. GESELL:

Q. What would be the purpose in seeking the patent?

A. I know of no situation where that was our intent, no.

Q. Let us take it the other way. Do you recall any time when Dupont systematically applied for patents for the purpose of building a patent fence to prevent competitors of Dupont from encroaching on the outer limits on Dupont's own processes?

A. No, our patents were based upon our researches.

Q. Do you recall any case where Dupont applied for a cellophane patent that was not based on actual research undertaken by the company?

A. From my experience, no. We never filed paper patents.

Q. Did you ever recall an instance where you applied for a patent which at the time you didn't think there was a reasonable possibility of the company using in its operations or licensing to someone else?

A. Our responsibility was to preserve the freedom of the company to enjoy the fruits of its research. It takes a pretty good crystal ball to look ahead for the life of a patent with any more than the best of comforting assurance. We filed
9438 to protect our freedom to utilize our researches.

Q. I want to direct your attention, Dr. Smith, to Government 2001 and 2001A.

Mr. GESELL. If your Honor please, those are consolidated in the material that the clerk handed to you a moment ago, that long black book. They are the answers to the patent interrogatories.

By Mr. GESELL:

Q. What did you have to do, Dr. Smith, with the preparation of the answers to the interrogatories contained in those two exhibits?

A. I assisted the legal department in providing technical information and factual matters with respect to those answers.

Q. They are signed by Mr. Biesterfeld. Is he alive or dead?

A. No, he is dead.

Q. The first thing I want to do is develop briefly what if anything has occurred in respect of the patent applications that are shown in these exhibits in order that we can bring them up to date as January 1, 1952.

I first want to ask you have any new patents issued on applications contained in this particular exhibit 2001 and 2001A since the time that they were compiled?

A. I am not clear as to what is meant by 2001 and 2001A.

By the COURT:

9439 Q. Have any patents issued since July 14, 1949?

A. One application has matured into a patent.

By Mr. GESELL:

Q. Is that United States Patent 2,570,478 which I show you?

A. I would not be able to identify it by number. Yes, this is the Titzl patent.

Mr. GESELL. If your Honor please, I think this should be added to the book of patents. It will go at the very last of the bottom one of those four books at the top of the shelf.

The WITNESS. For convenient reference that Titzl patent corresponds to Reference No. 268.

By Mr. GESELL:

Q. In answer to the interrogatories?

A. In answer to the interrogatories.

Q. Now, can you give us the references, Dr. Smith, to any applications listed in answer to the interrogatories that have been abandoned, if there are any, since that time? You can refer to any notes you have for that purpose.

A. Yes, there were eight that have been abandoned.

Q. And can you give us those reference numbers?

A. 254, 257, 258, 263, 264, 269, 417, and 420.

Q. And one other brief matter: Do I understand that in the further study of the answer to the interrogatories a

9440 duplication was discovered?

A. Yes.

Q. What was that?

A. Reference No. 413A is a duplicate of reference No. 212A and should be therefore deleted.

Q. With those changes and with respect to these subsequent questions I am going to ask you, I will be discussing the material in the interrogatories as brought up to date, January 1, 1952, and the first question I want to ask you is what were the total number of patents both expired and unexpired that would be listed in answer to the interrogatory so amended?

9441 A. Well, there are 428 items, inclusive of the eight abandoned applications, so that we would have 417 patents, three pending applications and eight abandoned applications.

Q. With respect to these 417 patents, will you tell me generally what phases of the manufacture and distribution of cellophane and caps and bands these patents related to?

A. Well, I think they cover all phases of manufacture from the preparation and manufacture of viscose through the extrusion of viscose into either sheet or tubular form, the mechanical equip-

ment necessary to perform those operations, the finishing operations of any of the products which came from those manufacturing operations, including the coating, moistureproofing, anchorage, various other treatments that might be given the plain cellophane film, also uses—well, it covered everything.

Q. Do I understand correctly that that number of 417 includes both existing and expired patents?

A. All of the items listed on GX 2001 as I understood it.

Q. Do they also include apparatus patents?

A. Yes.

Q. Now, I want to break that group down a little, to begin with, and I want to ask you, first of all, of this 417, how many of those patents relate to the manufacture of moistureproof cellophane?

9442 A. Moistureproof cellophane—well, my count would be 158.

Q. Now, what do you include within the term "moistureproof cellophane" in reaching that count? What aspects of the manufacture do you present?

A. Coating operations of plain cellophane, including heat seal, anchorage, mold inhibition, process and equipment for performing those coating operations, and solvent recovery.

Q. Now, while the basic moistureproof product patent was in effect, could any of those 158 patents have been practiced without a license under the basic moistureproof patent?

A. Certainly not for the the manufacture of moistureproof cellophane.

Q. Of this 158 that you have mentioned, how many were in force and effect as of January 1, '52?

A. 113.

Q. Can you tell me how many patents of a basic character issued to du Pont immediately following its invention, or shortly after its invention, of moistureproof cellophane?

A. There were five in that group.

Mr. MINICUS. I think that question is indefinite. I think we should have the term "basic" explained a little more definitely.

The COURT. Yes. Elaborate the question.

9443 Mr. GESELL. I was going to with the next question, your Honor.

By Mr. GESELL:

Q. Can you tell us broadly to what extent those patents covered moistureproof cellophane and methods or apparatus for its manufacture?

A. Well, the first patent, Charch and Prindle 1,737,187—that was the patent number—was what we considered the basic mois-

tureproof cellophane patent. It claimed as a new product a sheet or film of regenerated cellulose combined with a moistureproof coating composition.

It claimed additionally specific embodiments of that invention.

The remaining four patents we looked upon as basic patents in the sense that they were basic to our methods of operations and to the utilization of the compositions developed by Charch and Prindle.

The first of these, Charch and Prindle 1,826,696, claimed flowable coating compositions, comprising a cellulose derivative and a wax dissolved in a solvent and suitable for application to cellophane and to deposit a coating upon evaporation of the solvent.

Of course, it claimed also various modifications of that composition embodying in some cases resinous blending agents,
9444 plasticizers, or combinations of those things. We looked upon that as our basic composition patent.

Charch and Craig 1,826,697 was, I believe, the apparatus patent, which had to do with the machinery required for applying the coating to regenerated cellulose film, and it was specifically concerned with the use of doctoring knives to uniformly coat the base film with the composition.

Charch and Craig 1,826,698 was concerned principally with the method of coating, which involved application of the coating to the base sheet, followed by drying and optional humidification of the product, but more particularly it looked into the necessity for humidifying the base sheet before it was coated.

The fifth patent, 1,826,699, was another Charch and Prindle, and it was concerned with the method of moistureproofing wherein the coating compositions previously described in connection with the first of this group of four were subsequently heated at a temperature above the melting point of the wax component. Of course, that patent contained a large group of claims with various specific embodiments of the invention utilizing two-component, three-component, four-component systems and various combinations of the method as described in the specification.

Q. Well, now, when did the last of those patents expire?

A. Well, it was in 1948, I believe October.

9445 Q. What policy has du Pont adopted with respect to the licensing of its cellophane patents since the expiration of the basic patent?

A. Well, it has adopted the policy of granting licenses under them. In fact, all of its patents are so licensed to, well, I think it is is Olin Industries, the Acusta Agreement. Then it has placed all those on the Federal Register under which it had the right to grant licenses, the Register being that list of patents available for license or sale.

Q. Of the 417 patents which we were discussing in the interrogatories, how many of them relate to cellophane?

A. 368.

Q. How many of those were in force as of January 1, '52?

A. I will have to look for that—266.

Q. You say all of those have been licensed to Olin. Have some of them been licensed to others?

A. Some of them have, yes.

Q. Do you know of any case where any license has been refused?

A. Not to my knowledge, no.

Q. Now, if you eliminate from this group of 368 patents which relate to cellophane, as you previously testified, the customer use patents, how many patents remain?

A. Well, there were 68 patents which I classified as
9446 customer use patents. That would leave 300.

Q. How many of those have been used by du Pont?

A. 93.

Q. 31 per cent?

A. 31 per cent.

By the COURT:

Q. Who, Doctor, actually draws up the specification of the claims, or is that a composite production?

A. Well, I think more often than not it is composite. In some cases the specification prepared by Patent Service was used in toto.

Q. By the Legal Department?

A. By the Legal Department. In other cases it was revised. In every case the claims were always drafted by the Legal Department.

By Mr. GESELL:

Q. I believe you testified that you would draft applications, send them up, the attorney would then send it back, you would redraft it, and frequently there would be a discussion between you and the attorney, is that right?

A. That is correct.

Q. Now, you say that 31 per cent of these patents relating to cellophane were used. To what extent are you familiar with the du Pont Company's use of its patents generally, Dr. Smith?

9447 A. Well, I have a general idea as a result of discussions with other Patent Board members.

Q. Well, can you tell us how this percentage of use of the cellophane patents compares with the Company's use of its patents generally in its commercial operations?

A. Well, as I understand it, the general picture of use is about 30 to 32 per cent.

Q. Company-wide?

A. Company-wide.

Q. How does it happen, Dr. Smith, that patents aren't used after they are taken out, and can you give us from your experience some of the reasons and examples of cellophane patent non-use?

A. Well, of course, a patent is filed usually early in the life history of any invention in the sense that an early filing date is always a valuable thing to have in the case of interferences, and therefore at the time when filing is required, or the decision to file or not to file, the best that we can say is, "Well, if this thing works out the way we think it will, we will use it," and so we file a patent application.

Now a patent is granted and difficulties arise that couldn't have been foreseen. For instance, a critically essential material required for the practice of the invention may not be com-
9448 mercially available, or if it is commercially available, its cost may be so prohibitive as to rule the process out in competition with other effective processes.

There are times when the technology with respect to that part of the process had passed the patented technology. It takes, perhaps, three or four years to bring a patent application to issue. In the meantime some new technology is developed and that seems to be preferable, it turns out better results, and so we have a case where the technology just surpasses the patented material, makes it obsolete by the time the patent is issued, or shortly thereafter.

We have other situations which arise, where unforeseen difficulties in the adaptation of the invention to commercial operation occur, things that just couldn't have been foreseen.

I can illustrate each of those points, I think. We secured patents for a moistureproofing coating composition and the coated product obtained through its use, where we were relying on a moistureproofing composition comprising a synthetic resin and wax—we called it the Resin Wax Case. We set great store by that process at the time that the inventions were made and for some little time thereafter. But we were never able and haven't found to this day a synthetic resin which is commercially available and economically feasible to produce the results which we can get satisfactorily for the market with the processes we already have in operation and which have been used for some time.

9449 Mr. MINICUS. I wonder if the witness would identify the number of the case. I thought he was moving to another instance. I wonder if the witness would identify the number of the Resin-Wax patent?

The WITNESS. I will be glad to do it.

Mr. GESELL. That is proper cross-examination, your Honor. The witness is in the middle of an answer.

By the COURT:

Q. Is it in any one of these?

A. I think I can identify it better from my list.

The COURT. All right. Just read it into the record.

By Mr. GESELL:

Q. Will you go on with your answer? We will give Mr. Minicus that number later on.

A. The identity of the Resin-Wax patents to which I referred is Charch U. S. 2,147,628 and 2,147,629.

To illustrate the obsolescence of technology by the time the patent issues, I can identify the Leach, et al., 1 1,990,080. That patent had to do with anchorage of moistureproofing coatings to this base sheet. At the time it looked very good. It was concerned with the use of rubber as the anchoring medium, but by the time the patent issued we had in the plant in commercial operation an oilmodified glyptal resin which was better, cheaper, and so the leaching invention was never practiced.

9450 The other type of non-use which I mentioned had to do with unforseen circumstances in going from laboratory work into full-scale plant operation or even out beyond that in customer use. I think one of our patents will illustrate that point. It was also an anchorage case, Titzl No. 2,432,542. That patent was concerned with the anchorage of moistureproof coatings by means of an intermediate resinous deposit placed on the base sheet during casting operations where the resin was principally a melaminealdehyde condensation product and in the treating solution was an acid, hydroxyacetic acid.

But things happened in our attempts to put the invention into commercial use and it looked like a very good possibility. The synthetic resin tended, under the conditions of plant operation, to jell in the treating solution with the result that jell particles would be attached to the sheet as it moved into the drying part of the casting machine. Those jell particles would be transferred to the dryer rolls, would harden, and the result would be a product which was marked up, pockmarked and undesirable from the quality point of view.

That was unforeseen in our laboratory operation on which the specification was based and it could be eliminated at some expense. But more than that was the fact that production which we actually made of good quality and sold, when submitted to converter operations which involved printing we discovered that the com-

9451 ponents of this anchorage layer were interfering with the acceptance of the printer's ink and in order to print on that film it would have been necessary, according to the converters, to devise a new line of printing inks. We decided that wasn't a

good invention to practice when we had some others we could turn to.

9452 By Mr. GESELL:

Q. Dr. Smith, of the 158 moistureproof cellophane patents to which you have already referred, how many related to solvent recovery?

A. There were 32, as I recall it.

Q. How many of those were licensed in a block by American Solvent on a non-exclusive basis?

A. Thirty.

Q. Of the 126——

By the COURT:

Q. Before we leave the solvent patents, do you happen to know whether Sylvania has any patents on that feature of the process?

A. I don't happen to know. They might have, but I don't know.

By MR. GESELL:

Q. Of the remaining patents in that group, or 126, either our own or the ones that were licensed to us, how many have been used?

A. Twenty-eight.

Q. In what categories do those unused moistureproof patents fall?

A. Used patents?

Q. Do the unused patents fall. You said 28 were used. Now, in what categories do the unused patents fall?

9453 A. Well, they fall mostly in moistureproofing, anchorage and heat seal.

Q. Were the reasons for the non-use of moistureproof patents any different from the reasons you have already described generally as to cellophane patents?

A. No, they were not.

Mr. GESELL. If I may, your Honor, I would like to take a minute and recapitulate with the Court the statistics that have been established so far because it has bearing on some of the other examination to follow.

We have 417 patents in all listed in the interrogatories as they are amended, of which 368 relate to cellophane and 49 to caps and bands. Of the 368 that relate to cellophane, 102 have expired and 266 are in force as of January 1, 1952. Of those 266 in force, 113 relate to moistureproof and 153 to plain cellophane or customer use. Of the 113 that relate to moistureproof and are in force, all are licensed to others and all are on the Patent Register. Of the 158 total moistureproof patents in the period, 30 came to us non-

exclusively from the American Solvent Recovery, leaving 128 more.

By the COURT:

Q. Do you have a breakdown, Doctor, of the process patents and the patents covering the structure which is used in production? Do I make myself clear?

9454 A. What do you mean by structure, the product itself?

Q. No, no, the machines that are used in the manufacture of the product.

A. I do not have a separate breakdown there, but I do have one separating the process and equipment from the composition and product.

Q. Well, what is that?

A. In the coating operations only. Now, you want the du Pont owned patents in that category?

Q. Yes.

A. Under process and apparatus——

Q. In other words, I want to see what the emphasis was on du Pont's research.

A. I think I can answer that. Of the patents originating in du Pont in the moistureproofing group that I have been talking about, totaling 158 patents, 104 originating in du Pont. Forty-seven had to do with moistureproofing compositions or the products relating therefrom. Five had to do with slip agents, 1 with mold inhibitors, 19 heat seal patents, and 22 anchorage patents, 8 process and apparatus patents, and 2 solvent recovery patents.

The COURT. Proceed.

9455 Mr. GESELL. I want to turn now, if your Honor please, to a discussion of patents acquired from others.

By Mr. GESELL:

Q. Can you tell us, first of all, Doctor Smith, what part the Patent Service Section played in the acquisition of patents from others? By that I mean by license or by assignment, whether exclusive or non-exclusive.

A. Well, we have to break that down, I think, for discussion, into two parts, although the procedure was done the same. One part would be the question of—We are thinking now of acquisition by license?

Q. Yes.

A. Acquisition by license of incidental patents which we came across in our daily activities. Then there was another type of acquisition of licenses where an agreement would involve the grant of a license to du Pont, and as part of that agreement the acceptance of such a license by du Pont.

Q. Whether a patent was offered to you under an agreement or you learned of it on the outside and desired to get a license or acquire it by assignment, what part did Patent Service play in reaching the decisions in regard to what would be done?

A. Usually the matter was referred to us to determine whether or not it seemed advisable to acquire such a license, and we would discuss it with the technical people to determine
9456 its technical merit and possible utility. Sometimes at our request the research people would re-run examples in the patent just to get a little better picture of what its properties were, and then we would discuss with Management and recommend to them whether or not we thought that from the technical point of view the license ought to be acquired; and it was on the basis of those recommendations that Management reached some decision and either acquired the license or declined it.

Q. What would be the considerations that prompted you in recommending whether or not to acquire by license or otherwise?

A. Well, the considerations were technical merit and possible utility for the future operations of the company.

Q. When applications were submitted by La Cellophane or by Kalle or B. C. L. under the license agreements that are in evidence here did du Pont automatically as a matter of course file for patents equivalent to the foreign patents in this country?

A. Oh, no.

Q. Well, what proportion of the cases that were submitted from these so-called foreign associates would you say were made the subject of applications here?

A. Well, it was less than half in my recollection, and as I recall it, only thirty-three cases over a decade were filed.

9457 Q. Now can you tell us what the number of cellophane patents is that these answers to the interrogatories show were acquired by du Pont over this period?

A. Well, we acquired from others in this schedule, GX 2001, 129 patents.

Q. And of the 129 patents that you acquired how many were acquired by exclusive license or assignment?

A. Seventy-one.

Q. Of that seventy-one how many related to the manufacture and sale of moistureproof cellophane?

A. Well, inclusive of certain customer use patents which were sort of fringe patents, I would say there were about thirty.

Q. How many of the thirty were use patents?

A. Eleven.

Q. So that left nineteen that related to the manufacture of moistureproof cellophane that were acquired exclusively or by assignment; is that right?

A. That I believe to be correct.

Q. And of that nineteen how many came from Sylvania?

A. Nine.

Q. So of all the patents that were acquired by du Pont relating to the manufacture of moistureproof cellophane exclusively or by assignment there were only ten which came to du Pont from sources other than Sylvania?

9458 A. I think that is correct.

Q. Now I want to discuss these first of all as a group and take this whole group of 129 patents that were acquired in this cellophane art over this period. Were they as a group such as you would have been able by their use to exclude others from the manufacture of moistureproof cellophane?

A. In the absence of the five—the basic patents that I referred to earlier I think not.

Q. In other words, had it not been for those, others could have manufactured around these patents?

A. I think they could have, yes.

Q. Now I want to take them up with you in terms of their source or by company, and first of all can you tell us how many patents were acquired from La Cellophane?

A. Now we are talking about the whole group of 129?

Q. The whole group.

A. The twenty-one tons came from La Cellophane, one of which was non-exclusively licensed.

Q. Those were patents relating to plain, moistureproof, customer use or anything in the cellophane area; is that right?

A. There was none in that group that related to moistureproof.

9459 The rest related to casting operations, coagulating bath details, dryer operation and equipment, customer use including lamination, lamp shades. I think there were two or three in there that had to do with a thin cellophane and its use for cigarette tissues.

Q. They were all related to plain?

A. Plain cellophane only.

Q. How many did you get from Kalle?

A. We got fourteen from Kalle.

Q. Did any of those relate to moistureproof?

A. Yes, two.

Q. Which ones were they?

A. There was Schwable, et al, 1,930,666; and Muller, et al, 2,252,091.

Q. Were all of those acquired exclusively of this whole group?

A. Yes, all fourteen were exclusively licensed or assigned.

Q. What did the Schwable and Muller patents relate to?

A. Schwable had to do with a combination of doctor knives for especially wiping the edges of a coated sheet so as to improve the uniformity of the coating operation. And the Muller patent, if I remember correctly, had to do with a coating composition which utilized as a specific resin a commercial condensation resin which wasn't available in this country.

Q. What did the other patents cover generally?

A. The other patents covered viscose production wet end to the casting machine, hopper construction, cutting, slitting
9460 of film, customer use with respect to laminations. I have here one or two patents acquired from Kalle, two patents, the identity of which I don't recall at the moment.

Q. How many did you get from British Cellophane?

A. I think that was three.

Q. Did any of those relate to moistureproofing?

A. One did, yes.

Q. Which one was it?

A. Heaven, et al, 2,311,831.

Q. That was a coating patent, was it not?

A. Yes.

Q. What were the other two patents?

A. The other two patents were customer use patents which had to do with the lamination of cellophane, probably PT, if I remember correctly.

Q. Turning to the domestic situation and skipping for a moment Sylvania, which I am going to come back to, from whom else did you acquire patents in this country?

A. There was a group of patents we acquired from the Dobeckmun Company and the Humitube Company.

Q. How many were there in that group?

A. Twelve.

G. Generally what did they relate to?

A. They related to the heat sealing or solvent sealing of coated cellophane and packaging methods and apparatus
9461 which utilized that type of film in the packaging of cigars or similar commodities.

Q. We have already mentioned the solvents recovery group. Whom else did you acquire patents from here in this country?

A. There was a group of eleven patents under which we acquired non-exclusive rights from Marble Patents, Inc., which had to do with rubber derivative materials and rubber derivative film.

Q. Were there some miscellaneous patents acquired from various different people?

A. Yes. We have listed twenty-six items which were acquired from various companies or individuals.

Q. Can you tell us, in a general way, what those patents relate to and who you got them from?

A. One patent Kampf, U. S. 1,654,818 was licensed non-exclusively by the Alien Property Custodian. It had to do with some component in the coagulating bath and casting machine.

Q. Without going down the non-exclusive ones, can you tell us how many of this group were exclusive in this miscellaneous group?

A. Yes. There were ten assigned or exclusively licensed from that group—no, I better correct that. There were fourteen from the group of twenty-six which were either assigned or exclusively licensed.

9462 Q. To what did those relate?

A. One related to the cutting of plain cellophane; six related to coating composition; one related to a rancidity protector type of films; one was a ribbon patent—in fact, change that to four related to ribbons or tying strands and were customer use patents.

Q. From this whole group that related to moistureproof out of the ones we have been discussing, would you tell us broadly how you addressed the coverage and significance of the moistureproof patents in terms of the commercial manufacture of moistureproof cellophane?

A. I am sorry, I don't think I understand your question.

Q. How many in this group related to moistureproof cellophane?

Mr. FITZPATRICK. Objection, your Honor, until he clarifies which group.

Mr. GESELL. We have been talking about a group of 129 patents.

Mr. FITZPATRICK. They were the ones that were exclusively licensed or assigned, and the witness refers to those ten which were non-exclusively assigned. Therefore, we have bridged that group.

Mr. GESELL. There are 129 which were exclusive and non-exclusive, of which 71 were exclusive or by assignment. I am asking him broadly as to the whole group.

9463 By the COURT:

Q. Does the witness understand what the question is?

A. He was talking about 129 patents of all categories.

By Mr. GESELL:

Q. That is exclusive or non-exclusive or anything else?

A. Right.

Q. How many of those relate to moistureproof cellophane?

A. Of the 129 acquired from others, all of the 129 patents under which rights were acquired from others, there were 54 which ap-

parently came from others and related to moistureproof cellophane.

Q. I believe you said of the total acquired exclusively or by assignment relating to moistureproof there were 30 of which 11 were customer use?

A. 30 of which 11 were customer use patents.

Q. Taking that group of patents, the broad number, whether exclusive or non-exclusive, could any of those patents have been employed to prevent others from manufacturing moistureproof cellophane?

A. I don't believe so.

Q. Do you know of an occasion in respect of any of these acquisitions where Dupont acquired the patent for the purpose or with the intention of suppressing the patent and not using it?

A. I have no recollection of such an intention.

9464 Q. Now, we have passed over, so far in the detailed discussion, the Sylvania patents. How many patents were acquired from Sylvania relating to moistureproof cellophane under the moistureproof agreement?

A. None.

Q. Can you tell me what the function of the patent section was in connection with the operations of that agreement?

A. Yes. Patent Service was charged with the responsibility of seeing to it that Dupont's obligations under the agreement were met. When a Dupont patent coming within the scope of the agreement was brought to issue, the attention of the management of the department was directed to that issue and the fact that a license would be required under the terms of the agreement was brought to his attention and all of the provisions of the agreement were applied to that patent and his attention was directed appropriately to those with the suggestion that he bring it to the attention of Sylvania in accordance with the agreement.

Q. What about the situation in reverse? What did you have, if anything, to do with the acquisition of patents under the Sylvania moistureproof agreement?

A. We watched for the issue of all patents in the field of moistureproof cellophane, and as soon as the official gazette an-

9465 nounced the issue of such a patent we picked it up and examined it and in anticipation of the day when Sylvania would advise us of its issue we considered it from the point of technical merit and possibility. There again our technical people were involved. Experiments were frequently run in the laboratory to help us answer the question of what its utility might be.

Q. Are you familiar with the coverage and scope of the nine patents that were obtained from Sylvania under the agreement?

A. Yes, I think so.

Q. How would you address the importance of those patents in terms of their coverage and significance to the commercial manufacture of moistureproof cellophane?

A. I considered them relatively unimportant. We never found it necessary to use any of them.

Q. Will you tell us why you think they are unimportant?

A. Because they don't cover processes or compositions which are broad enough to require licenses for the manufacture of an acceptable commercial moistureproof cellophane.

By the COURT:

Q. I can't understand that, Mr. Smith. Why would you take a license, in the first instance, and save yourself a payment of royalties, for a patent which is not workable?

A. I don't think it is fair to say it is not workable. Those inventions were workable.

9466 Q. You say it is of no use to you. What is the use? Why did you do it?

A. Under the terms of the agreement, when a patent issued we were given a short time relative to this kind of study to decide whether we would like to accept a license under that patent. We evaluated to the best of our ability what its potential might be and in that short time we would say to Sylvania that we preferred to accept the license which is our privilege under the agreement. As time went on it became evident that that process or that composition wasn't essential for our operation in the moisture cellophane business.

Q. Did you have any royalty obligation under these patents if you didn't use them?

A. No.

Q. Could anyone have ever practiced any of those patents without a license under the basic moistureproof prior patent of Dupont?

Mr. MINICUS. Objection until the time is specified.

9467 The COURT. I think that calls for a legal conclusion as to the scope of the basic patents and as to whether or not the cellophane patents were without the scope of du Pont's basic patents.

By Mr. GESELL:

Q. Well, do you know, talking about the period, Mr. Smith, that the basic patent was in effect—and of course all I have in mind when I talk about the patent is while it existed, not when it didn't exist—having in mind that period, based on your knowledge and experience of methods of making moistureproof cellophane, would it have been possible to have made moistureproof cellophane under one or more of these Sylvania patents without infringing the basic moistureproof patent?

A I don't believe it would have been. The basic Charch and Prindle patent claimed as a product a sheet or film of regenerated cellulose combined with a moistureproofing coating composition. To make that product by any of the patented processes or the utilization of any patented composition contained in this group of 9 patents that we just discussed would, I think, have infringed that claim—at least, the product so made would have come within the scope.

Q. Now, in your analysis and study of these patents to the extent you made any at the time they were ac-
9468 quired under the agreement, do you recall any consideration being given by yourself or by anyone else as to the desirability of taking these patents or any of them for the purpose of preventing Sylvania from licensing them to others?

A. No, we did not consider that factor at all.

Q. Did you actually attempt to operate some of the Sylvania patents in connection with the appraisals you made of them at the time?

A. Yes, we did.

Q. How was that done?

A. There were two patents in there particularly which related to the moistureproofing of cellophane by an atomic dust of paraffin, if you will, and we thought that might be an excellent composition. In fact, we had been looking for some time at the idea of moistureproofing by some system of that general character.

So we tried it out. To our dismay we found out it didn't come through with good quality, economical production, and so we ultimately decided there wasn't any point in pursuing it any further.

Q. Now, Dr. Smith, how many patents, cellophane patents, does Sylvania have, if you know?

A. Well, I know of 67.

Q. And under how many of those was du Pont ever licensed?

9469 A. Eighteen.

Q. Well, you have mentioned 9 that came under the moistureproof agreement? Where did the other 9 come from?

A. Well, there were 3 that had to do with plain cellophane and 6 that were principally concerned with caps and bands.

Q. Now, taking those that were related to plain cellophane, the 3, how did you happen to obtain licenses under those?

A. Well, 2 of them were customer use patents we got licenses under, and the third was, I believe, the Morgan patent having to do with rancidity protective film.

Q. Now, in carrying out this moistureproof patent license agreement, did you have any instructions, or were you ever given any indication of any kind from anyone in du Pont or otherwise that

the agreement was to operate or mean something different than it said in its four corners?

A. I was never given any such instructions.

Q. Well, to what extent did you actually carry out these agreements in accordance with their terms?

A. Well, it was my responsibility to do my best to do that, and I did the best I could.

Q. Did you ever hear or were you ever informed, by anyone or do you yourself know of any broad, general
9470 understanding with Sylvania to pool patents regardless of whether or not they were covered by formal agreements or existing agreements between the parties?

A. None whatsoever.

Q. Did du Pont and Sylvania ever exchange patent applications or ever give each other patent applications to your knowledge?

A. I never had any exchange of patent applications with Sylvania. The only time I believe I ever saw a patent application by Sylvania was at a time when it might be involved in an interference procedure where the application was available through the Patent Office in the course of normal practice.

Q. And in your experience did du Pont and Sylvania ever exchange technical information, visit each other's plants, and so forth?

A. There was no such exchange of technical information that I know about with the possible exception that during the war there arose the question of preparing gas capes, I believe, in accordance with approved specifications and the desires of the military service. There may have been some technical interchange there in order that the Government requirements might be satisfied.

Q. Well, apart from that?

A. Apart from that I know of no other technical
9471 interchange.

Mr. GESELL. I am turning now to the interferences, your Honor.

The COURT. Very well. We will recess until 2:00 o'clock.

(At this point a recess was taken until 2:00 o'clock p. m., the same day.)

TWO O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

WILFRED WINTER SMITH (resuming).

Mr. GESELL. I am turning now with the witness, your Honor, to the 15 interferences which are the subject matter of the allegations in paragraph 33 and on which the Government introduced documents. It is alleged in 33 (e). That is one of the places.

Direct examination (cont.) by Mr. GESELL:

Q. What part, Dr. Smith, did the Patent Section play in the settlement of cellophane patent interferences?

The COURT. Before the witness answers that, you said 15,
9472 there are only 12. One was abandoned by the Government.

Mr. GESELL. I said 15, your Honor. They added some by subsequent letters.

The COURT. We originally had 13, then they struck one; they struck No. 74,559.

Mr. GESELL. The numbers I have, your Honor, are 69,624, 73,959, 7,341, 68,654, 71,448 and 9, and a third one that grew out of that, 7,511; 73,673, 71,566, 72,191, 68,801, 68,197, 74,629, 74,837——

The COURT. Without going further, they do not coincide at all with the Government's index of exhibits and the interferences they are relying on.

Mr. GESELL. I am relying on, your Honor, on the answer which the Government gave us on pretrial, not on their index. I think your Honor will find that the index is insufficient in that in some instances only a single number is shown when actually there were two or three interferences involved in the particular agreement, and perhaps that is the confusion, though I haven't looked at that index very much in recent times. Our records show that there was evidence put in on all 15.

By Mr. GESELL:

Q. Do you have the question in mind, Dr. Smith? I will state it again.

9473 What part, if any, did the Patent Section play in the settlement of cellophane patent interferences?

A. Usually the task of arranging for settlement of interferences was delegated by the management to the Patent Service. In most instances that was me. And it was our task to arrange for conferences with representatives of the other parties. Sometimes that ended up by having the attorney do it for us. At other times I was personally involved.

That led to a discussion of the possible terms for a settlement agreement, the conditions under which we on the one hand would be willing to settle and the conditions on the other hand that the other party would be willing to accept, as they had their own case to present also.

Then ultimately there would be a recommended plan for settlement which would be submitted to management for approval.

Q. To what extent are you familiar with the interferences which are listed on Schedule C of the interrogatory response 2001, a copy of which I show you (handing to witness)?

A. Well, while it is difficult for me to identify some of these interferences simply by the number reference which is given here, I think that I can safely say that I was familiar with some part of all of them. They had to do with cellophane patent matters.

9474 Q. Did you participate in conferences at which discussions were had within the company as to whether or not particular set interferences should be settled and what policies would be adopted with respect to settlement?

A. Usually.

The COURT. How shall I interpret "Exr. Int Fs"? Is that Examiner of Interference?

The WITNESS. Yes. I think that would be correct, Examiner of Interference.

By Mr. GESELL:

Q. Now, having in mind the 15 particular interferences which were involved in this case and which we are going to discuss in a moment, Dr. Smith, can you tell us what was the extent of your particular familiarity with that group of interferences?

A. I think that with one exception I was closely concerned with the settlement arrangements and I was familiar with the other one that is on the list.

Q. What is the one exception of that fifteen?

A. That would be the one—I don't recall the number.

Q. What was the subject matter?

A. It was the subject matter of cellulose tubings for grip handle parts of athletic equipment.

Q. Number 63,558 with Spaulding?

A. It involved the Salley application of Dupont.

9475 Q. Except for that one you say as to the others you were directly involved in the negotiations?

A. I believe so, yes.

Q. What was the policy adopted, if there was one, by Dupont with respect to the settlement of these interferences?

A. The policy with respect to settlements was one where if the settlement was proposed we were always willing to entertain that proposal, and if a settlement could be arranged which would be reasonably acceptable to us we would prefer to settle rather than to litigate, the reason for that being rather obvious: That an interference proceeding is a complicated proceeding and if you carry through the litigation through testimony stage it can be very time-consuming and expensive: If it were at all possible to avoid that we would like to do so.

Q. All of these fifteen were settled, were they not?

A. Yes.

Q. Roughly what period of time did it take to work out the settlement of some of these?

A. Settlement of an interference could range anywhere from a year and a half to five years.

Q. Were there any that took as long as five years here?

A. Yes, there was one, the one that involved—it originally involved five different parties.

Q. That was the resin-wax group?

A. The resin-wax interference took about five years to complete from the date of declaration of interference.

9476 Q. You say you settled to save time and yet some of these took that long. Will you explain your answer?

A. Time-saving came in the diversion of the research people from their research operations to prepare and take part in testimony proceedings, and while these carried over a period of five years we didn't spend all our time on it. It was a question of correspondence and exchange of ideas and what the settlement terms might be, and a period of revision of those terms, submission to the department manager and submission to the patent board. All those things require relatively short periods of time in themselves, but there were intervals in between. We were not at it constantly for five years.

Q. Having in mind this group of 15 interferences which we are going to identify and discuss and with which you are familiar except in those instances where several interferences were settled by a single agreement, were each of these settlements, contracts or negotiations a separate and distinct transaction?

A. Yes, indeed.

Q. Do you know of any overall agreement or understanding which Dupont had to divide fields of manufacture with any of the parties to these 15 interferences?

A. No such understanding.

Q. In the course of your negotiations with these various parties involved, did you ever hear any of them indicate an intention or desire to enter the cellophane business?

9477 A. No, I recall no wish to enter into that business.

Q. Now, I want to direct your attention to Interference Numbers 69,624 and 73,959 in which Carbide, Eastman, Hazel Atlas and Sylvania were parties in addition to Dupont involving as the record shows, vinyl resin wax compositions. Are you familiar with that interference?

A. Yes.

Q. Will you tell us, in a general way, what was the significance and importance of the inventions involved in those interferences and cellophane technology in the commercial manufacture of cellophane?

A. The subject matter of that interference turned about compositions comprising synthetic resins of a specific variety, the vinyl resins in combination with waxes useful as moistureproofing compositions among other things, I presume.

That subject matter was specious in our case which we called resin-wax moistureproofing compositions, a departure from the basic Church and Trindle compositions utilizing a synthetic resin and a wax as the essential components of a moistureproofing composition.

At the time these two interferences were established that technology was extremely important to us. We envisioned that that synthetic resin-wax composition might become a composition which could displace the four component system we were using at that time.

Bat with the passage of time and with the lack of
9478 availability of any commercial resin which would satisfy our needs for making a moistureproof film which would be economically feasible and satisfactory in competition with the four component system we were using in the plant, it lost technical significance. I would say that the ultimate contribution to cellophane technology was negligible.

Q. How was the settlement in this case arrived at, these cases, these two interferences?

A. Settlement was arrived at by what we call horse trading in a business way to find an acceptable set of terms which both parties could utilize to their satisfaction.

We had, on the one hand, the basic moistureproofing patent. The practice of the invention involved in the interference would, in our estimation, have come within the scope of that patent in so far as regenerated cellulose film was concerned.

9479 Accordingly we felt that any settlement agreement in that field could be entered into only if there would be no effect on that basic moistureproof position. And so the terms were arrived at by a discussion with representatives of the other parties and we came to the settlement arrangements that are embodied in the settlement agreement.

Q. Who in fact was prior as to the counts on the interferences?

A. Our inventor was prior as to all counts.

Q. How does the subject matter of these interferences relate to du Pont's basic moistureproof patent? That patent wasn't involved in the case, was it?

A. No.

Q. Well, how did they relate?

A. Well, as I say, the subject matter was concerned with the moistureproofing coating composition, and such a composition applied to a base film regenerated cellulose would result in a product

which would come within the scope of the Charch and Prindle claim for such a product.

Mr. GESELL. Now, if I may, your Honor, I would like to point out that these two interferences which we have just discussed—and I am going to turn to additional interferences—constitute the principal evidence, except, I think, for another interference that we are coming to, the only evidence that the Government
9480 has that Eastman was a potential competitor or that Eastman was excluded from the business, one of the many unfounded ascertains that they have been making.

By Mr. GESELL:

Q. I want to turn next, Dr. Smith, to interference 70,341, which involved du Pont and Monsanto on the Aroclor resin wax composition.

Mr. GESELL. With respect to this, your Honor, I would point out that this constitutes the only evidence in the case, this interference, of du Pont's exclusion of Monsanto and of the charge being made that Monsanto was prevented from going into the cellophane business by du Pont.

By Mr. GESELL:

Q. Can you tell us what was the importance and significance of the inventions involved in this particular interference, No. 70,341?

A. Well, the subject matter here again was specific under the broad consideration of a resin wax moistureproofing composition. The Aroclor resins were a variety which were being manufactured by the opposing party, Monsanto. We had found them useful in the practice of our resin wax invention. The interference was established on that species alone, resin and wax.

Again we thought that the resin wax system had excellent
9481 potential and we therefore sought to do what we could on the one hand to preserve what was properly ours in the Charch application and to assure ourselves of accessibility to that species, and we did that latter thing by way of settlement agreement.

Q. Well, now, who in fact turned out to have been prior in this instance?

A. Well, very surprisingly to us it turned out that the Monsanto inventor was awarded priority, albeit we had a filing date two years prior to his filing date.

Q. And how was this settlement arrived at?

A. By the same mechanism of discussing with representatives of that company and arriving at a set of conditions acceptable to both parties which would again, from our point of view, still

leave us with the protection of our basic moistureproof patent and the accessibility to this species as an exclusive right.

Q. Were your involved in this particular interference personally?

A. I participated in the discussions with respect to the settlement of the interference, yes.

Q. Within du Pont?

A. Within du Pont.

Q. Or with representatives of Monsanto as well?

A. No, I did not talk to representatives of Monsanto.

Q. You participated within du Pont?

9482 A. Within du Pont, and as an assistant to the members of the Legal Department or our legal counsel who were handling it.

Q. I now want to direct your attention to interference 68,654, between du Pont and Hercules, involving chlorinated rubber wax coating compositions. Were you familiar with that interference?

A. Yes, sir.

Q. Will you evaluate for us the importance of the inventions involved in that interference and their relation to the broad subject matter of the basic product patent?

A. Well, this interference, like the preceding ones, turned about subject matter which was specific under the broad resin-wax composition case. It was specific in the sense that rubber derivatives were used as the resinous material in combination with wax.

At that stage of the game again we had set great store by this resin wax possibility and we didn't know which species would be the one that would be the most successful to use commercially, and since we felt that in our Collins application we had a right to secure those claims if we were prior inventors, we pursued the interference procedures.

Q. And who in fact was prior here?

A. Our inventor was prior with respect to regenerated cellulose coated with these rubber derivative wax compo-

9483 sitions and also prior as to broad counts; specific counts as to paper were, I believe, awarded to the Hercules inventor Shankweiler.

Q. How was the settlement arrived at?

A. There we arrived at the settlement by discussion again with representatives of Hercules. Those meetings did not involve me personally either.

Q. Next I come to interferences No. 71,448, 71,449, and 7,511 that grow out of these two involving ester gum wax compositions. Are you familiar with those?

A. Yes. I think you should correct that third interference; it is 75,116.

Q. Now, who were the parties there?

A. That was a complication. I think the parties to those two interferences—there were four parties involved in the two or three interferences, du Pont, Eastman, Monsanto and an application that we always believed was the property of Wolff and Company.

Q. Did you participate in these actual settlements?

A. Not personally, no.

Q. Did these also involve the resin wax situation?

A. Yes.

Q. Who in fact was prior?

A. Well, in the first interference, which I think was 71,448, priority was awarded to Beech of Eastman.

9484 The subject matter there was concerned, as I recall it, with coatings applied to cellulose acetate sheeting rather than regenerated cellulose sheeting.

In the interference 71,449, two of the parties filed no preliminary statements and consequently they had no standing in the interference. The party Monsanto, which was the one remaining party besides du Pont, filed a motion to dissolve the interference on the grounds of unpatentability of the counts.

Since the subject matter which had to do with applying these compositions from molten condition was something relatively unimportant in our thinking at the time, we didn't oppose the motion to dissolve on the grounds of unpatentability, and so the interference disappeared.

The other interference, 75,116, was declared by the Patent Office on our motion to substitute our Charch case, one which ultimately matured into one of the resin wax patents which I identified earlier today, and that interference involved Beech of Eastman, Jenkins of Monsanto and Charch of du Pont, and du Pont was awarded priority on all counts.

The settlement arrangements in that interference eventually led to an agreement with Eastman. No agreement was ever entered into which involved Monsanto.

Q. Did you participate in the negotiations with Eastman?

A. Only as an assistant to the legal counsel who was

9485 the spokesman in personal contact with them.

By the COURT:

Q. Now, in all these cases give me examples of what the actual settlement was. What did the parties do? Take the last case. What did du Pont and Eastman agree on?

A. Well, of course, your Honor, you realize that in a settlement negotiation neither party is assured as to the outcome of the argument as to priority.

The settlement that we elected in this instance was one which would give to du Pont the exclusive right to utilize these ester gum wax compositions on regenerated cellulose film. That was the species which was comprehended by the broad claim, and other claims, of the Church and Prindle basic patent.

We were perfectly willing to litigate this interference *is* that particular provision could not be acceptable to the other party. But it was acceptable to the other party. So that was one provision in that settlement agreement.

The Eastman Company, on the other hand, was interested in cellulose acetate sheeting, cellulose derivative sheeting, and they likewise felt that since that was their business they would be willing to accept a settlement which would not jeopardize their position.

And so as a matter of trading between the parties we came to the conclusion that as far as we were concerned, if they wanted exclusive rights to a cellulose acetate sheet
9486 moistureproof with ester gum wax, we were willing to concede that in order to preserve the item that we wanted to preserve. We were willing to give that up.

Had we litigated the case, since we won priority on all counts in the three party interference with Church, we might have had claims which would have dominated—in fact, we did have claims eventually which dominated the entire situation, and we would have had that without the necessity of granting any licenses at all.

The COURT. Proceed.

9487 The COURT. Proceed.

By Mr. GESELL:

Q. The terms of these settlements, the ones we just talked about, were reduced to formal contracts, were they not?

A. That is right.

Q. In all cases?

A. That is correct.

Q. I believe you testified that those contracts were submitted for approval up through the patent board in accordance with the procedures you described?

A. That is correct.

Q. Coming to 72,633, that is an interference between Dupont, Goodyear and Marsene involving the plioform articles moisture-proofing compositions, do you recall that interference?

A. Yes.

Q. That also was in the group of resin wax, was it not?

A. That is correct.

Q. Who was prior on the counts there in the interference?

A. That was a very complicated story in that particular case.

Q. Will you tell us what happened and how it was resolved?

A. It originally started as a three-party interference. One of the parties, Marsene, was eliminated from the contest by usual Patent Office procedure according to the rules
9488 because of its inability to make the counts in issue. That reduced the interference to a two-party conflict.

Rather than litigate the case with Goodyear, the proposal was made—I don't recall which party proposed settlement—but the proposal was made to settle the interference by agreement, and we proceeded to do so having arrived at a formal agreement. Priority was considered and awarded to Dupont and suitable notice bringing the interference to a close in the Patent Office was filed.

Much to our surprise, after all that, we were served with notice of a new interference that had been declared between our application and this Marsene application which evidently had been appealed to the Court of Customs and Patent Appeals, with the result that those claims which had been argued about in the earlier interference were somehow reinstated in the Marsene patent. We were back in again now with a new two-party interference from which Goodyear had been eliminated by the award of priority to Dupont.

Well, that interference was litigated. Testimony was taken and the final decision, which I never understood, awarded priority to the Marsene inventor.

We ultimately issue the application involved with one rather specific claim which was different from the broader claims that were won by Marsene. That final action vitiated the entire
9489 agreement with Goodyear because we had nothing left to do with it. I think that is the story.

Q. So far we have discussed of these 15 interferences 8, have we not? Just to recapitulate, as I understand it, all eight of those involved this single resin wax problem that you have discussed in connection with the earlier one; is that right?

A. That is right, and the overall period of prosecution of the resin-wax case required about nine years in view of this waterfall of interferences.

Q. Now, the next interference is No. 71,566 between Dupont and Marsene involving rubber hydrochloride. Do you remember that?

A. Yes, I do.

Q. Did that have anything to do with cellophane?

A. Only very remotely.

Q. And what was its relation to cellophane?

A. The only possible relation it would have to cellophane could come from the utilization of the rubber hydrochloride as a component of a moistureproofing coating composition.

Q. What was the principal subject matter of the interference?

A. The subject matter of the interference was concerned with a process for converting a dian hydrocarbon to a hydrohaloid by treating with a liquid hydrohaloid such as liquid hydrogen-chloride.

9490. Q. Tell me what that means so I understand it. What was that all about in ordinary business terms?

A. It was the idea of taking natural rubber or synthetic rubber and treating it with liquid hydrogenchloride to make a rubber dydrochloride out of it.

Q. Turning to interference No. 2191 between Dupont and Eastman involving sulphanimide plasticizers, what is the significance of the subject matter of that interference to cellophane technology?

A. The subject matter of that interference was concerned with certain chemicals of the class which you have mentioned which would be useful as plasticizers as cellulose derivatives in lacquers, molding composition and self-sustaining films or any other use to which a cellulose derivative such as cellulose acetate might be put.

Should that plasticizer happen to be used in such a cellulose derivative composition which additionally had moistureproofing properties, then I suppose it could be concerned with the coating of cellophane.

Q. Were you involved in this particular one?

A. I didn't participate personally in the settlement arrangements, but I again advised our patent counsel, who did.

Q. Who was prior on the counts in interference?

A. As I recall it, Eastman was prior as to that interference.

9491 Q. And again was settlement arrived at by negotiation?

A. Yes.

Q. The next two of them come along together involving specifically plasticizers 68,801 and 68,197 between Dupont and Eastman. Do you recall those interferences?

A. Only very remotely because those cases were concerned again with the broad proposition of specific materials suitable as plasticizers for cellulose derivatives. The Dupont cases involved didn't originate in cellophane research and the interference and anything related to it was conducted by someone else, although there was at times opportunity for me to express what our interest might be.

Q. They were settled on a non-exclusive license basis?

A. They were settled on an exchange of non-exclusive licenses under the claims of any patents which might issue to any party.

Q. The next is No. 74,629 between Dupont and the Aluminum Company of America involving aluminum dryer rolls. Do you recall that?

A. Yes.

Q. What was the subject matter of that one?

A. That involved the construction of certain rolls used in the drying operation in the manufacture of plain cellophane.

One of our inventors had hit upon the idea of using aluminum with a certain surface finish as the body of a dryer
9492 roll, the objective being to prevent the film during drying operations from shrinking laterally any more than we could possibly help.

We filed the application covering this particular type of aluminum surface as a dryer roll. It turned out that the Aluminum Company had some applications concerned with this same type of treatment to modify the surface of aluminum, and so we became involved in the interference.

That was settled by negotiation. I did that myself by visits and talks with certain executives of the Aluminum Company.

That agreement embodied, if I could recall correctly, a license to Dupont exclusive for the manufacture of regenerated cellulose film provided it was in commercial operation in Dupont within a relatively short period of time, either three or five years, I don't recall which. But we didn't use it and the license reverted to a non-exclusive license.

The priority in that case was divided. Some of the claims which had to do with one variety of treatment were awarded to the Aluminum Company and some claims with a different variety of treatment were awarded to Dupont.

Q. The next one is 74,837, between Dupont and American Can Company involving lined containers for oil and similar materials. Do you recall that one?

A. Yes.

9493 Q. What was the subject matter of that and what was its importance to cellophane technology?

A. That interference had to do with the filed application which we had covering a process for providing cellophane liners in cardboard containers which containers would be useful for oily materials.

We hoped to develop a product which could displace the tin cans on the corner service station with one quart of oil, etc., and our inventor had devised a method for supplying such a liner in a cardboard container.

We were under final reduction in the prosecution of our case when a patent issued to Magill assigned to this can company with claims substantially identical with those that we were prosecuting in our case.

We had a filing date in our case which was a considerable time prior to the Magill application and we were puzzled as to why,

with the senior party position, a patent should issue with claims where we were under final reduction, so we copied the claims from the patent and put it up to the Patent Office to decide where the priorities should lay.

It turned out eventually Magill did have an earlier reduction to practice. At least, he was awarded priority and that interference, however, was settled by an agreement between Dupont and the can company which would give us access under the claims of
9494 Magill so that if any of our customers would like to proceed with the construction of oil containers of this variety they would have freedom to do so.

Unfortunately that particular structure never succeeded in the development of oil containers and its technology, which fell by the wayside.

Q. The next, 63,558, involving grip covers for athletic implements, such as golf clubs and tennis rackets with Spaulding, are you familiar with the subject matter of it?

A. Yes, I am familiar with that.

Q. Have I properly charactertized what the subject matter was?

A. Yes. That involved the application of a shrinkable cellulose hydrate band on the grip portion of an athletic instrument like a golf club.

We thought there was an excellent field there for protection of such leather grips against customer mistreatment in a sporting goods store. We thought it would be very nice to have a cellulose tubing protector on the grip portion.

The Spaulding Company filed an application which had comparable subject matter. It was in interference and ultimately priority was awarded on all counts to Dupont.

The settlement agreement of that interference gave to Spaulding exclusive rights under any claims that Salley might get for golf club protection provided the volume of business maintained
9495 a given minimum level. In the event that they didn't maintain that volume the license would become nonexclusive.

Spaulding never developed the market enough to retain the exclusive license and, in fact, I doubt if they practiced the nonexclusive license simply because sportsmen would have nothing to do with an artificial cover on the grip of a golf club. He said, "That is not the way I am going to play with it. I want to test it the way I am going to play with it. Let us take that thing off. It went by the wayside.

Q. Taking the patents involved in these interferences we interviewed as to group and on the basis of your knowledge and experience of the manufacture of cellophane, were any of these patents individually or as a group such as to have enabled the owner

thereof to exclude others from the manufacture of either plain or moistureproof cellophane?

Mr. MINICUS. I think that calls for a conclusion on the part of the witness, your Honor.

The COURT. He is qualified as an expert, I think.

A. Well, I think we have to look at that again this way. If whenever anyone gets a patent with claims in it he is entitled to exclude others, as I understand the patent law, from the practice of the invention so claimed.

It may be that he himself is unable to practice his own invention because of the dominating character of claims in the patents of others.

9496 I can answer your question in this way: That regardless of who might have gained priority in any of these patents which relate to moistureproof cellophane, anyone possessing such claims would have had to take into consideration the basic moistureproof patent before he could practice the invention which he had patented unto himself.

I am unable to see how anyone could make—let me say it this way—anyone could practice an invention of coating a sheet of regenerated cellulose with one of these resin-wax compositions and end up with a moistureproof sheet and stay away from Charch and Trindle.

Q. Turning for a moment to caps and bands, Dr. Smith, how many patents has Dupont owned or had rights under covered in these interrogatory answers relating to caps and bands?

A. I believe there were forty-nine patents and one application involved.

Q. How many of those were acquired from sources outside of Dupont?

A. I don't remember that figure. Twenty-one.

Q. How many of those acquired were non-exclusive?

A. Nine.

Q. Viewing the group that were acquired, the group of twenty-one, individually or as a group, can you tell us who some of the people were that they were acquired from?

9497 A. Some of them were acquired from Sylvania, some were acquired from French associates and some were acquired from individually owned patents in this country.

9498 Q. Did du Pont receive any useful inventions from the foreign associates with respect to caps and bands after the original purchase of Capes Viscose?

A. No. The only patent that I think of—well, there were two patents in the caps and bands field that were rather important contributions. One was the patent to Bautier and Fays, U. S.

2,141,776. That patent was concerned with what we call the window band and its manufacture.

The other patent came from Viscose Development, the Fletcher patent, U. S. 1,997,769, which had to do with the printed band.

Mr. GESELL. That is all.

Cross-examination by Mr. FITZPATRICK:

Q. Mr. Smith, if I understood your testimony this morning correctly, of the 417 patents which du Pont owned or controlled in the field of cellophane—those were the entire 417 patents in the field of cellophane and caps and bands—158 covered moistureproof?

A. Yes. I think I said that 158 were concerned with moistureproof cellophane.

Q. Now, I believe then you said that a certain number of those 158 came from the American Solvent Recovery Company?

A. Yes, there were 30 included in that group which were licensed to us as a group from American Solvent Recovery.

9499 Q. Thirty?

A. Yes.

Q. Were they non-exclusive licenses?

A. Non-exclusive licenses.

Q. Removing those 30 Solvent Recovery patents from 158 covering moistureproof, that would leave 128 covering the field of moistureproof cellophane, is that correct?

A. That is correct, bearing in mind that that 158 includes no customer use patents.

Q. It does not include customer use?

A. It does not include customer use patents.

Q. Now, then, sir, did you state how many of those 128 were used by du Pont?

A. Yes; I think I said that 28 were used.

Q. Now, for a moment, if we may, Mr. Smith, direct our attention to this procedure which the research man goes through in approaching the Patent Service Section when he intends to submit a proposal for an invention, am I right in saying that he submits an outline of his technological development to you?

A. Yes, a very brief one. It is not the objective of this requirement to have the research write a patent specification. He merely exemplifies what he has done in a brief fashion so that we can understand the field of technology involved.

9500 Q. Now, does that research man have anything to do with the drafting of the application?

A. Yes, because the Patent Service man collaborates very closely with him in acquiring the technical facts and in stating properly the conditions of operation of the invention. The Pat-

ent Service man may discuss with the research man, of course, the equivalents for the material which has already been recited, and the research man can then inform him as to what the proper equivalents are, what the limits of operation are, and other details which are necessary to properly define the invention for the purpose of the patent specification.

Q. That is to help you draft your memorandum to the patent department?

A. Yes.

Q. The legal department?

A. That is correct.

Q. Now, in your memoranda you don't attempt to draft claims?

A. No, we do not. The most we have ever done in that field was to suggest in sort of layman's fashion the nub of the invention, as we call it.

Q. But then neither yourself nor the research man has anything to do with the drafting of the claims themselves?

A. Well, I wouldn't say that. If we don't like the claim drafted by the attorney when it comes back in the
9501 attorney draft, we challenge it, and he either satisfies us that it is correct or he does it some different way until we are in agreement.

Q. But the ultimate responsibility of the claims is with the attorney, the ultimate decision as to the claims?

A. I think that is a fair statement, yes. We rely upon his legal skill to take care of that.

Q. Now then, do either yourself or the research man have anything to do with determining whether or not one, two, three or four applications will be filed on any particular technological advance?

A. That is a decision which was left to Patent Service.

Q. To Patent Service?

A. Yes. We made the decision as to whether one or more applications would be filed in any particular research.

Q. You made the decision then as to whether or not various species applications would be filed or whether they would all be included in one case?

A. Yes. We would first define the invention and attempt to so definite in its broadest aspects obviously.

Then we would develop from the research date available the species which were useful within that broad concept. Then we would write a case which would broadly disclose the invention with suitable illustrative examples to support the broad
9502 disclosure. And we would claim what we were entitled to claim under the law in view of that specification.

Q. Suppose the situation were one of a new method and a new apparatus, would your section make the decision as to whether or not a single application would be filed or whether two applications would be filed?

A. Yes, we would make that decision. Mind you, these decisions were not made arbitrarily. We took advantage of consultation with our research experts, with our mechanical experts, with our research director. Anytime we needed some information to settle a question of whether or not to file, we would glean all the information we could from these technical associates and then we would stack that information up against the prior art, decide whether or not the utility was appropriate, and in view of technical merit and utility, we would file an appropriate number of patent applications to adequately protect the invention.

Q. Well, Mr. Smith, if your section had nothing to do with the ultimate decision as to the type of claims which should be entered in the case, how then can you say that you determined whether or not, for instance, method and apparatus claims would go in the same application?

A. Well, I think I said to you that in the drafting of the claims the attorney referred his draft to us with the appended claims.

9503 Now, if we didn't like the claims, their nature or scope, we discussed the matter with the attorney and usually if we had appropriate argument, we could win our position to what we thought was proper, what we wanted as the protection afforded.

The attorney chose the language in the claim to express the protection. In the course of prosecution of the application, after it was filed, amendments are referred to our people—I should say office actions are referred to our people—they consider the prior art and again advise the prosecuting attorney on the technical aspects of that office action and the effect of the prior art on the claims in the case.

So we don't lose track of the case as soon as we turn is over to the attorney, not by a long shot.

Q. But the attorney had the ultimate responsibility of determining what claims shall go into what case?

A. I think the attorney has the responsibility of seeing that the claims presented are appropriate claims. We as the attorney's client can insist, I believe, and always have on the kind of protection we want, and it is up to him to so state the claims in proper fashion as to afford us the protection we seek, subject of course to the actual Patent Office who may reject those claims.

Q. Well, then, Mr. Smith, if I understood your direct
9504 testimony, you stated that, to your knowledge there was never any attempt made to apply for patents in order to prevent competitors from encroaching upon the outer limits of your processes?

A. I have no recollection of ever filing a case with that intention.

Q. That would be alternative processes, ones that you didn't intend to use?

A. Well, let me not be quoted as saying that there were any processes we filed on that we never intended to use. If we had some research which afforded what appeared to be a useful invention, we sought to protect that invention in the sense of providing accessibility to the use of it should we be able to use it as we hoped we might be.

Q. Wel, now, if I may, Mr. Smith, I would like to go back to the statistics for a moment. You state that there were 158 patents covering moistureproof cellophane?

A. Yes.

Q. And am I right in saying that you also testified that 54 of those were acquired from others?

A. Yes—inclusive of the solvent recovery.

Q. Inclusive of the solvent recovery?

A. Inclusive of the solvent recovery, 30 which came from American Solvent Recovery.

Q. And am I also correct in remembering your testi-
9505 mony to be that of those 54 acquired from others, 30 were exclusively licensed or assigned to du Pont?

A. Yes, I think that is correct.

Q. And have you not just told me, Mr. Smith, that 30 patents were non-exclusively licensed from the American Solvent Company?

A. Well, now, you are bringing in the 11 patents which I said were customer use patents, and they were excluded from the 158 moistureproof patents. If you want to include those 11 patents, you must add them to the 158.

Q. And that would make what then?

A. 169, if you want to use that calculation.

Q. 169, I see. Of the 158, I believe you said that 104 were developed by du Pont?

A. Yes.

Q. First let's establish this, Mr. Smith. Thirty were exclusively licensed to du Pont by outsiders, 30 of these 158 patents?

A. No—there were only 19 of this 158. If you put the 11 customer use patents on there, then you have 30, yes. There were

only 19 of this 158 which were exclusively licensed or assigned to du Pont.

Q. Well, of the 104 patents developed by du Pont itself, could you tell us how many du Pont used?

A. Yes—it will take me a moment. Twenty-eight
9506 including two which were solvent recovery patents and which were not included in my earlier figure of 28 when I mentioned moistureproof patents that had been used.

9507 Q. Twenty-eight out of 104 were used?

A. That is correct.

Q. Approximately 25 per cent?

A. Yes, sir.

Q. Mr. Smith, could you tell me when you first became associated with cellophane patents?

A. In August 1931.

Q. In 1931?

A. That is right.

Q. And you were employed then by——

A. I was employed by the Dupont Rayon Company in the technical division as part of the—I don't remember whether it was a patent division or a patent section at that time. The titles have been shuffled around from year to year, but it was essentially Patent Service as of that day.

Q. Then the Rayon Company Patent Service Section handled the Cellophane Company's patent work?

A. That is right.

Q. Mr. Smith, could you give us any idea of how many patents in the field of cellophane and caps and bands Dupont owned or controlled prior to 1929?

A. May I have that question over again?

Mr. FITZPATRICK. Would you read the question?

(The last question was read by the reporter.)

A. I would have to count that up from this chart. I
9508 can't give it to you offhand.

Q. Do you know if it was many?

A. It wasn't very many, no.

Q. Fifteen or twenty?

A. Prior to 1929 it would have been for the most part patents which had been acquired from La Cellophane or the Associated French Companies that contributed technology on caps and bands.

Q. And these were in the order of fifteen or twenty or twenty-five at the most?

A. I wouldn't like to be pinned down to the precise number because I haven't had a chance to extract that data from these sheets. I would say it was about that order of magnitude, yes.

Q. Were any of them considered of any value?

Mr. GESELL. By whom? I object, if he is not going to answer the question.

Q. By Dupont.

A. Well, I think that the value of a patent is something that I would not be prepared to estimate as of that day. I wasn't involved in the business at that time and I don't know who considered what patents to be of any value in that time.

Q. Isn't it true that in 1925 Dupont didn't own a single patent under which it was operating?

A. I don't know that that is true. It might be. I could
9509 check it with my list.

Q. If I show you Government Exhibit 1411, the sentence I have checked here, is that not substantially what that exhibit states?

Mr. GESELL. I object. That is not the way to ask the question with respect to such a matter. The witness said he came to work in 1931. He is now being asked what the situation was in 1925 and he is showed a document and is asked to read from it out loud. It is not all the document either, I don't believe.

The COURT. What is the relevancy of this sentence, Mr. Fitzpatrick?

Mr. FITZPATRICK. Your Honor, this witness, as I understand the impact of his testimony, it has been directed to the fact that Dupont has only applied for patents which were the valid products of its research. It never had any illegal intent behind its patent practices. I am attempting to establish how much the witness knows of the Dupont origin in this field.

The COURT. We have to have a cut-off period from 1931 back. He wasn't with them.

By Mr. FITZPATRICK:

Q. Will the witness then admit that prior to 1931 he knows nothing of the Dupont patenting policies?

By the COURT:

9510 Q. Are you willing to admit that? Is it the fact? Did you know anything about it?

A. Prior to 1931 I knew nothing about Dupont patent practices.

The COURT. Now, as to the other questions, I would suggest that the witness, over the week-end make the count in answer to those preliminary questions you asked because I think you are entitled to that information.

The WITNESS. May I ask what the precise nature of that information is which is requested?

The COURT. It will be written up by the reporter and you will have an opportunity to read it.

Mr. FITZPATRICK. May I have a moment, sir?

The COURT. Certainly, of course.

By Mr. FITZPATRICK:

Q. Mr. Smith, you have testified as to the five so-called basic or significant patents which Dupont held in this field of moistureproof cellophane, and I wonder if you could tell me briefly the names of those four aside from the product patent once again—their titles, what they were known as in the trade, I mean the coating, the moisture-proof coating composition patent. One was an apparatus patent, was it not?

A. Yes, the first one, the first one—do you want them specifically identified by number, for instance?

Q. No, sir, just briefly.

9511 A. In the order of their patent numbers the first one was concerned with coating compositions, flowable compositions. The second one was concerned with apparatus. The third one was concerned with method of applying of coating, and the fourth was concerned with method of treating the coating after it was one.

Q. You stated, did you not, that they were basic to Dupont's operations?

A. Yes.

Q. Did you mean by that that had someone else intended to go into the manufacture of moistureproof cellophane they wouldn't necessarily have infringed any of those four patents?

A. I believe that would have been possible to have made a moistureproof product without infringing those patents. How practicable it would have been, I don't know.

Q. The apparatus patent, is Dupont operating under that today?

A. The apparatus patent, no.

Mr. GESELL. Just a minute. The patent has expired.

Q. Were they operating under it at the time of its expiration?

A. No.

Q. The first of the two method patents, I believe that is 698, was Dupont operating under that patent in 1948 when it expired?

9512 A. Yes, I believe it was.

Q. Now, would it be fair to say that these two processes generally confines the steps of dissolving a cellulose derivative, a wax, a plasticizer, a gum and a solvent coating plain cellophane and evaporating the cellophane therefrom in various degrees of breadth?

Mr. GESELL. I object. I don't know what processes he is talking about.

The COURT. Maybe the witness does.

Mr. FITZPATRICK. The two method patents.

Mr. GESELL. I think the question isn't clear, and therefore we wouldn't know what the answer meant.

The COURT. Will you repeat the question?

(The last question was read by the reporter.)

The COURT. I think it is a good question.

A. Some of the process steps have been left out, but in a broad sense I think that could be a simple statement of what went on.

By Mr. FITZPATRICK:

Q. And those two processes were not the only ones possible for the manufacture of moistureproof cellophane?

A. I believe not the only processes.

Q. Were they the only ones used by Dupont?

A. Yes, I think they were.

Q. But there were other ones?

9513 A. Yes, sir.

Q. For instance, would it be possible to make moistureproof cellophane by impregnating cellophane while in its jelled state with a moistureproofing composition comprising a wax, plasticizer and a gum in the form of a solution or dispersion eliminating the liquid medium of the composition and subsequently coating the impregnated solution with a shellac, varnish or dope?

A. That sounds like one of our patents for emulsion treatment to get a moistureproof film.

Q. Dupont did apply for and receive a patent on such process?

A. There was one very much like it. Whether that is the one you are quoting from, I don't know. If you want to identify it, I will be glad to comment further.

Q. Would it be the Charch Patent No. 1,989,681?

A. If I may see a copy of the patent I will be glad to tell you. Yes, if I understood your description of the process correctly, that is one which is comprehended by this patent. The broadest claim of the patent does not require the top coat, however, but other claims, I think, comprehend that.

Q. That, then, was an alternative method of manufacturing moistureproof cellophane?

A. That is what the patent claims.

Q. Dupont patented it?

9514 A. Yes.

Q. Did it ever use it?

A. Not in commercial operation, no.

Q. Did it ever consider it important?

The COURT. For what?

Mr. FITZPATRICK. May I rephrase the question?

By Mr. FITZPATRICK:

Q. When the case was filed was it considered of any significance?

A. By all means. If it were possible, the moistureproof regenerated cellulose by putting a moistureproof agent on in the casting operation, we would have eliminated the coating operation entirely. You will note that I called your attention to the fact that the first claim of this requires no top coat and it was our hope at that time that such a method would work out to be of commercial practicability.

9515 Q. You were not with the Company in 1930, were you, Mr. Smith?

A. I was with du Pont, yes.

Q. You were not involved in cellophane patents in 1930, were you, Mr. Smith?

A. No, I was not involved in patent matters at all until after that time.

Q. Could you tell us, sir, when that application was filed?

A. The application was filed in 1929.

Q. I show you Government Exhibit 2469, the second page thereof, at the heading, "Moistureproof Material and Process of Making Same" and ask you whether or not that is a statement of the patent application which subsequently matured into this patent 1,989,681 [handing to witness].

A. Yes. I think this description here refers to the same case.

Q. Do the serial numbers check?

A. They do.

Q. Does the document state that that patent application was a minor case, an alternative method of making moistureproof cellophane?

A. The statement here is that it is a minor case, but there can be some question as to when that statement was made——

Q. When was the statement made, Mr. Smith?

9516 A. According to this document, it says in 1930.

Q. Were you with du Pont Cellophane in 1930, Mr. Smith?

A. I was not, but I assisted in the prosecution of this case to its eventual allowance and issue, because it did not issue until February, 1935.

Q. Would it be possible, Mr. Smith, to make moistureproof cellophane by first coating the base of regenerated cellulose with a moistureproofing composition comprising a gum, a wax and a plasticizer and subsequently coating that product with a shellac or a varnish or a dope?

A. Well, there again, if you would like to—I think that is very much like another application that we filed and prosecuted to issue as a patent.

Q. Is that substantially what was known as the two-stage process applied for and patented in a patent number 2,147,628 to Dr. Charch, which I show you (handing to witness)?

A. That is the case I was thinking of, yes.

Q. That then is another alternative method of making moistureproof cellophane?

A. Yes.

Q. Did du Pont consider that method at the time of filing it to be of any significance?

A. Well, I wasn't there when it was filed, so I don't know
9517 what they thought about it at that time, but I do know that by the time I became active in cellophane patent matters, this was considered to be of great importance. This is the patent case from which the divisional application, serial number 461,840, covering other specific resin wax combinations, came. This is one of the two patents to which I referred earlier as the resin wax coating composition patents.

Q. Did du Pont ever manufacture under that two-stage process?

A. As I think I said earlier on direct examination, we did not.

Q. Would you again refer to the second page of Government Exhibit 2464, Mr. Smith, under the heading, "Moistureproof Cellophane Two-Stage Process", the third heading on the page.

A. Yes, I have found it.

Q. Does it not state there, sir, that this was a minor case, another alternative method of making moistureproof cellophane?

A. It states, "This is a minor case protecting an alternative way of carrying out the parent invention."

Q. And that statement was made in 1930, was it not, sir?

A. So the document says.

9518 Mr. GESELL. I object. He hasn't any knowledge of this document at all. He has been reading it into the record. He has not been shown to have seen it. It was written before he was with the company.

The COURT. Is there a pending question?

(The Reporter indicated in the negative.)

By Mr. FITZPATRICK:

Q. Now, Mr. Smith, much of your testimony this morning was directed to anchorage coatings and moistureproof composition coatings and adhesives. Do you know when, sir, du Pont first became interested in those particular fields?

A. Will you repeat again those fields?

Q. Anchorage coatings, moistureproof composition coatings, other than anchorage coatings, that is, and adhesives.

A. Well, of course, moistureproof coatings were of interest to the Company shortly after they got into the cellophane business, if I understand the past history correctly. Anchorage coatings came along shortly thereafter because it became evident that many uses of moistureproof cellophane would be limited, or excluded, if the moistureproof coating wouldn't stay on the base sheet.

As far as adhesives were concerned, that was a particularly pressing problem shortly after the original moistureproof
9519 invention was made, because if the material were to be used as a wrapping material around a package, it was rather essential that it be possible to glue the pieces together somehow. So an adhesive was of primary importance.

That was, as I understand the situation, one of the early research problems associated with the development of moistureproof cellophane.

Q. And du Pont was interested in these probably before you came with the Company in 1931?

A. Yes, they were, and the research continued after I was there. That is why I happen to know a little more about it than if it had all stopped before I got there.

Q. Now, the basic moistureproof patent had issued in 1929, had it not, sir?

A. That is correct.

Q. Do you know whether or not du Pont was worried in around the period 1930 or '31 that that basic patent might be involved in an interference?

A. I don't know about their being worried about it. Do you have any more specific identification of some situation?

Q. Such a situation was possible in those years, was it not, sir?

A. Oh, I suppose, yes; anybody could copy a claim from a recently issued patent.

Q. It is not true that in those same years several
9520 applications were filed on anchorage coatings which du Pont did not consider to be very important?

A. I think there were some anchorage cases filed in that period of time. Who considered them unimportant I don't know. I have no evidence that anyone considered them unimportant except relative to some other patents we might have.

Q. Do you remember, sir, a Siemann patent number 2,042,638, which involved impregnated jelled cellophane with a water soluble softener then employing moistureproof coating composition?

A. I think that was a water insoluble softener.

Q. Water soluble.

A. May we have the patent to settle that question?

Mr. FITZPATRICK. Excuse me, your Honor. We can't seem to locate that.—I am sorry, I have it here [handing to witness].

The WITNESS. The claim states a water insoluble softener.

Mr. FITZPATRICK. Excuse me, sir.

By Mr. FITZPATRICK:

Q. United States serial number 408,932 is the number appearing on that patent application, is it not?

A. That is correct.

9521 Q. Is it not true that du Pont considered that to be unimportant from a technical standpoint?

A. Yes, indeed, and it was.

By the COURT:

Q. Unimportant?

A. It was unimportant in the sense of a good practical anchorage. This was one of the early attempts at getting anchorage, and it did anchor the coating.

It was based on this line of thought, that a water insoluble material like tricresyl phosphate would be impregnated into the base film and serve as a flexibilizing agent for the base sheet.

Now, trycresyl phosphate is a good plasticizer for a cellulose derivative composition. Therefore, if we were to impregnate a base sheet with this water insoluble material, make it stay in there, some part of it may reach out into the coating, you see, and form a sort of mechanical bond between the coating and the base sheet, a form of anchorage, if you will.

It was one of the early efforts, and I think experience proved that it was definitely superseded by much better methods later.

Q. Is it not also true that in 1929 du Pont filed another anchorage moistureproofing composition involving the use of an oxidized drying oil to anchor the composition to the film?

9522 A. That sounds familiar also. I don't remember just which patent it was.

Q. Is it not also true that they considered it an unimportant and minor process?

The COURT. Don't you think the witness ought to have the patent if you are going to interrogate him on that, if you are going to ask him about that patent?

Mr. GESELL. He really ought to say when they considered it.

Mr. FITZPATRICK. At the time of filing.

Mr. GESELL. He wasn't with the company then.

Mr. FITZPATRICK. Your Honor. this patent never issued—this application never issued.

The COURT. Do we have the application in evidence?

Mr. FITZPATRICK. The application is not in evidence. It is mentioned in Government Exhibit 2469.

The COURT. Well, identify the application for the witness and then see if he has any knowledge concerning it.

Mr. FITZPATRICK. 409,994, Charch, Hyden and Siemann.

The COURT. For what?

Mr. FITZPATRICK. For anchoring by using an oxidized drying oil.

The COURT. All right.

9523 The WITNESS. Yes, I remember that case. While the invention was made and the case was filed before I arrived on the scene, as in the case of these other patents, the prosecution continued for some time and I did participate in that, assisting the patent attorney in the technical evaluation of the matter.

Now, oxidized drying oil afforded anchorage, but I think that one of the difficulties attendant on the use of that material was color, transparency, tackiness, that might have made it less attractive to any of us—I should say to any of the research people, as a practical method for anchorage.

Q. You don't know, sir, why those patent applications were filed in those years?

A. No, I don't.

Q. You never heard any discussions about why they were filed?

A. Well, on this day I can't recall whether I ever did have any discussions as to why they were filed, outside of a general policy that it was our responsibility to protect the researches of the company, if that were reasonable possible within the patent law.

Q. You don't remember that Mr. Biesterfeld and Mr. Spruance had been trying for years to strengthen du Pont's patent position without success?

A. I never heard of that.

9524 Q. In 1930 the moistureproof patent had issued?

The COURT. It issued in November, '29.

The WITNESS. Yes, November, '29.

By Mr. FITZPATRICK:

Q. But it had not yet been adjudicated?

A. In 1930? I dare say—well, all right.

Q. Is it not true that in 1930 du Pont had filed its resin wax application?

A. Yes. That was filed in June, 1930.

Q. Is it not also true that in 1930 du Pont acquired an exclusive license under the Groves patent which covered a moistureproof coating?

A. In March, 1930, du Pont acquired a license under the Groves patent 1,366,256, but I do not believe that that is a moistureproofing composition.

Q. Did du Pont think at the time it purchased the Groves application that it was an enhancement of its patent position?

A. No.

Mr. GESELL. Objection, your Honor. That is again before he came with the company. He hasn't laid any foundation——

Mr. FITZPATRICK. May I rephrase it then and say——

By Mr. FITZPATRICK:

Q. Did you ever hear any discussions before the year
9525 1933 that the Groves patent might be an important patent?

A. I was not present at any discussions which might have led to the acquisition of the license because obviously the license was acquired before I arrived on the scene. But I am familiar with discussions which had to do with that particular patent.

That license was acquired because it claimed, if I remember correctly, a varnish or lacquer containing a mixture of waxes intended to retard the evaporation of the solvent. It was an airplane dope patent. My recollection of the acquisition of the license under that patent stemmed from discussions where if in the practice of our Charch and Prindle process we were to use a mixture of waxes at any time, such action might be interpreted as coming within the broad coverage of this Groves claim, which merely recited a lacquer or varnish containing a mixture of waxes.

We never had, as far as I know, any concern about the moistureproofness of that combination, but since it would broadly comprehend the use of a mixture of waxes, the license was acquired in order to make it possible to use such a mixture should we wish to do so. We never did.

Q. So you say you were never interested in the moistureproof characteristics of the lacquer. Did you ever test it for moisture vapor permeability?

A. Yes.

9526 Q. Did you find the results satisfactory?

A. I didn't personally, but it was tested in our research laboratory?

Q. Did it fall within the range of desirable moistureproofness?

A. That I don't recall.

Q. Now, sir, you have testified on direct examination, as I remember it, that of the patents which du Pont acquired from its foreign associates, that number was only about fifty percent of those patents which were offered to du Pont by those associates, is that correct?

A. Yes; I think that was even a generous figure.

Q. But by virtue of the agreements with Kalle, B. C. L., and

La Cellophane, du Pont was entitled to the first option on any patent that they might develop, is that correct?

A. I don't think that that is a correct statement. We were entitled to an exclusive license under any patent which might issue in this country, whether we filed it or anybody else filed it, if it originated with Kalle or one of these associates.

9527 Q. So even though you only took licenses under about 50 per cent of the ideas offered you, you still had the first choice at all of the improvements which they developed?

A. I think the agreement provided for that.

Q. Now, you testified that although each and every time Sylvania offered you a license under the moistureproof agreement you accepted it, you never accepted it with the thought that by doing so you were preventing other people from obtaining a license from Sylvania; is that correct?

A. I believe I stated it that way.

The COURT. Refresh my recollection, Mr. Fitzpatrick. Was the Sylvania license an exclusive license to du Pont?

Mr. FITZPATRICK. Yes, sir.

By Mr. FITZPATRICK:

Q. Is it not true that each and every time you did accept such an exclusive license it had that effect on other possible persons desiring licenses?

A. Well, it is obvious if an exclusive license granted to one party, why, no other license can be granted within the same field as the original license.

Q. Was there any particular reason why you always took an exclusive license?

A. The agreement, by the terms of the agreement we were entitled to an exclusive license.

Q. Do you mean by that that Sylvania would force you to

9528 take an exclusive rather than a non-exclusive license if you so desired the latter?

A. I wouldn't know about that. I doubt that they would. I don't know what Sylvania would have done.

Q. Mr. Smith, under direct examination you testified as to the motives which prompted you as a member of the Patent Service Section or the Patent Board in deciding whether or not du Pont should exercise a license agreement with an outsider; is that not true?

A. May I have that question, please?

(The last question was read by the reporter.)

A. If by exercise you mean acquire——

Q. Acquire, take up. Would you repeat those motives which usually prompted you?

A. I don't know whether I can repeat those verbatim or not, but the motives for acquiring a license under any circumstance would be to acquire freedom to operate under the claims of another patentee. That is the principal motive of acquiring a license.

Q. Your motive was never one of executing a license on a patent which you thought might be invalid so that the result would be that you would be able to operate under that patent yourself and at the same time keep others out of the field?

A. No, I think not.

9529 Q. I show you Government Exhibit 2190 and ask you is that your signature? Do you recognize your signature on that letter?

A. Yes, I think I wrote that memorandum.

Q. Is it not true that in the fourth paragraph of that memorandum it states your motives on one occasion, I believe, for suggesting that du Pont take up a license with Sylvania?

A. I think this does not refer to the motives as you say. This was an after-the-fact memorandum which at that time was a very brief discussion of a relationship with Sylvania Industrial Corporation aimed at the cross-licensing under two patents concerned with rancidity protective film.

This document was written to acquaint the general manager with—I shouldn't say the general manager—the manager of the Cellophane Division, as I recall it, with some of the circumstances attendant upon this exchange of licenses, and I negotiated this license.

When I approached Sylvania in this matter this situation had arisen; the Morgan patent, U. S. 2,043,860, I believe, had issued and our Hunter case 2,062,179 was on the verge of issue as a patent. The claims had been allowed. So when the patent issued I approached Sylvania because there was a certain field of overlap between those patents with the idea of exchanging the non-exclusive licenses under the patents.

9530 One of the first considerations tossed at me at the time was that this ought to be a pretty good business. It would be nice, therefore, if we could keep it to ourselves.

I remember replying to the Sylvania representative to whom I was talking that that didn't sound like a very good idea to me.

I fought desperately through several weeks and months of negotiation to keep this thing down to the original non-exclusive license that we wanted to get, and that was the way the agreement finally ended up with the support of the legal department who drafted the conditions under which the agreement was executed.

Q. Could you give me the name of that gentleman in Sylvania with whom you were discussing the situation?

A. Yes, Dr. Worth Wade.

Q. And in your memorandum, Government Exhibit 2190, the fourth paragraph, do you state that you believe the claims are invalid?

A. This statement here says, "and recognizing the probable invalidity of claims in both patents," that was a statement which was made by Dr. Wade to me and it was a matter of opinion on his part.

Q. Does not the last phrase of that sentence state that "we" meaning du Pont "opposed Sylvania with the proposition of a cross-license which would enable both of us to operate and at the same time keep others out of the field"?

9531 The COURT. There should be no hesitancy. It is there. It is written.

A. That is what it says.

The COURT. We will adjourn until the 23rd. Adjourn court until Monday morning at 10:30.

(At this time the trial was adjourned to Monday, April 21, 1952, at 10:30 o'clock a. m.)

9532 MONDAY, APRIL 21, 1952, 10:30 O'CLOCK A. M.

Present: As before noted.

WILFRED WINTER SMITH (Resumed).

Cross-examination (cont.) by Mr. FITZPATRICK:

Q. Dr. Smith, in your direct testimony you included a brief discussion of the five so-called basic Charch and Prindle patents; is that correct, sir?

A. That is correct.

Q. I assume, Doctor, that you are familiar with their relationship to the Sylvania moistureproof agreement?

A. Yes.

Q. If you will, Doctor, considering the agreement in juxtaposition to those patents could you tell us in your opinion just what claim or claims are co-extensive in scope with the subject matter of that agreement?

A. That is probably a little difficult to do with neither the patent nor the agreement in front of me to compare the language. I can give some general ideas, perhaps.

Q. (Mr. Fitzpatrick handed the witness some papers.)

A. Well, I think that the principal co-extensive relationship was with respect to the claim or claims of the first Charch and Prindle patent which was concerned with the manu-

9533 facture of a sheet or film or regenerated cellulose combined with a moistureproofing coating composition and which claimed that product.

Q. Would you be able, sir, to specify what claims of that patent?

A. I think all of the article claims of that patent which were

broadly stated with respect to the moistureproofing coating composition, at least the first eight claims.

Q. The first eight claims, sir?

A. There could have been others.

Q. Is not claim 7 limited to a cellulose derivative in the composition?

A. Yes, actually 7 and 8 are limited to cellulose derivative compositions, but——

Q. Is the agreement, Doctor——

Mr. GESELL. He is in the middle of an answer.

Mr. FITZPATRICK. Excuse me.

A. (Continuing.) But the earlier claims 1 through 6 have no such limitation.

Q. Would it not be the first six claims which would be coextensive with the agreement rather than the first eight?

A. Well, I don't know exactly what you are driving at. All right, we will reduce it to the six broader claims, then.

Q. Well now, Doctor, was the agreement by its terms restricted to transparent moistureproof cellophane?

9534 A. Oh, I think the agreement was intended to be concerned with moistureproof regenerated cellulose film.

Q. Well then, doctor, aren't claims 2 and 3 and 5 and 6 of the basic patent limited to transparent moistureproof regenerated cellulose?

A. They may be.

Q. Are they, sir?

A. Claims 2, 3, 5, and 6 contain the transparent limitation.

Q. So then, Doctor, as far as the exact terms of the Sylvania moistureproof agreement are concerned, the only claims in any patents which du Pont owned which were co-extensive with the subject matter of that agreement were claims 1 and 4 of the basic Church and Prindle patent; is that correct?

A. Yes, I think I would have to say that.

Q. And if the field of the agreement were to be considered transparent moistureproof regenerated cellulose, then only claims 1 to 6 of the basic Church and Prindle product patent would be coextensive with the agreement?

A. Oh, no, unless you wanted to include also the limitation of cellulose derivative, because all the remaining claims which are specific to cellulose derivative coatings are concerned with transparency, flexibility, moistureproofness, and non-tackiness.

Q. They are concerned with it, sir, but they are not as broad as just purely transparent moistureproof regener-

9535 ated cellulose?

A. They are more narrow than those claims, yes.

Q. Then in reality, Doctor, there was only one basic patent as far as this moistureproof industry; is that not true?

A. Well, I think I testified on direct examination that of the five, one was a principal product patent, the basic patent claiming moistureproof cellophane. The other four patents were considered as basic to the operations of du Pont.

Q. And you told us, did you not, Doctor, that other machines could have been used to coat moistureproof regenerated cellulose other than the Charch and Prindle apparatus in patent No. 1,826,697?

A. Oh, yes, I think there were likely possibilities of other equipment and perhaps other processes that might have been used, might have been operable. How practical they would have been I would not know.

Q. As a matter of fact, Doctor, du Pont itself was not using that patent when it expired in 1948?

A. Which patent was that?

Q. The apparatus patent, sir.

A. No, we stopped using that patent rather early in its history. We displaced it with better technology.

Q. I think you have told us, have you not, Doctor, that there were other possible methods of coating moisture-
9536 proof regenerated cellulose besides the two described in the Charch patents Nos. 1,826,698 and '699?

A. Yes, I think I made that statement.

Q. Last Friday, Doctor, when I asked you whether or not the Charch method patent No. 1,826,698 was being used by du Pont when it expired in 1948 I believe you said yes?

A. I said I thought it was, yes.

Q. I would like to show you, Dr. Smith, a letter from yourself to Mr. J. L. Fahs dated July 15, 1948.

Mr. FITZPATRICK. I ask that it be marked Government's Exhibit 2919 for Identification.

(The letter from Dr. Smith to Mr. J. L. Fahs dated July 15, 1948, was marked "Government's Exhibit No. 2919 for Identification.")

Q. Doctor, do you recognize that letter?

A. Yes, I think I must have written it.

Q. Does the letter state that table 1. lists the United States patents owned by du Pont and involved in the manufacture of cellophane by du Pont as of March, 1948?

A. Paragraph 2 reads that way.

Q. And the method patent No. 1,826,698 had not expired by that date, had it, Doctor?

A. No, I think it expired a few months later, October, I believe.

Q. Is it included on that list as one of the patents
9537 employed by du Pont in the manufacture of cellophane?

A. No, it is not listed.

Q. Would you take it, then, that it was not being used in 1948?

A. I would assume that as of the date set forth here we had stopped using it, that is all.

Q. Doctor, the moistureproof coating composition patent to Charch No. 1,826,696, did it, sir, cover all possible coating compositions which might be used to moistureproof regenerated cellulose?

A. Oh, no.

Q. There were others?

A. Yes.

Q. Resin wax, sir, would be one of those?

A. Yes. That No. 1,826,696 was concerned with compositions which comprise a film former of the cellulose derivative variety. Now, resin wax, as you may recall from earlier discussion, did not utilize the cellulose derivative in the moistureproofing coating composition at all.

Q. Well then, Doctor, of the four Charch patents, aside from the product patent, wouldn't it be more proper to characterize them as being rather broad than basic?

A. Well, I think that gets to be sort of a technicality. We looked upon them as the principal patents under which we operated in our course of manufacture. We thought of them
9538 as the basic moistureproof patents. Now, I suppose you can define "basic" as broadly or as narrowly as you want to, but that was the way we looked at them.

Q. But, as a matter of fact, Doctor, is it not true that as of the expiration date of those four patents du Pont itself was not using two?

A. Yes, I think we have established that. However, I don't see why it is essential that even a basic patent be utilized for its entire life.

Q. Now, Doctor, the first six claims of the product patent were broad and valid, were they not?

A. To the best of my knowledge they were, yes.

Q. And at the same time of Sylvania's entrance in the moistureproof field, Doctor, you would feel that they were of necessity infringing those six claims?

A. Yes, I think so.

Q. Now, Doctor, I understand that you came to the du Pont cellophane division in August of 1931?

A. That is correct.

Q. And was Sylvania manufacturing moistureproof cellophane on that date?

A. I don't know. Actually I think they were, but I don't know.

Q. The product patent had issued in 1929?

A. That is correct.

9539 Q. Do you know, sir, when Sylvania first started to manufacture moistureproof cellophane?

A. I don't have that actual date, no.

Q. If they were manufacturing moistureproof cellophane in 1931, Doctor, and the basic product patent had issued, would there be any reason why du Pont would be unwilling to sue on that patent alone?

A. I don't know whether there would have been a reason or not. I was not there to decide anything prior to that time.

Q. You don't know, then, Doctor, that du Pont purposely delayed bringing that moistureproof action against Sylvania until subsequent to the issuance of the four other Charch and Prindle patents?

A. I don't recall that, no.

Q. Did you ever hear, Dr. Smith, a statement by Dr. Charch to the effect that even if the moistureproof product patent were to be lost that in his opinion the method and apparatus patents would be real hazards to a competitor?

A. I don't know that I have heard Dr. Charch say that, but I can understand why he would, because I think they would have been.

Q. Do you think that was a consideration that du Pont might have considered if it were thinking of suing upon its basic patent before the other patents had issued?

Mr. GESELL. Objection, your Honor.

9540 The COURT. What is the point of your criticism?

Mr. GESELL. It is asking for the witness's surmise, your Honor.

The COURT. As to what the company——

Mr. GESELL. As to what Mr. Charch or somebody might have thought at the time when he was not there. I don't think it is a proper question.

The COURT. I agree with you. Objection sustained.

By Mr. FITZPATRICK:

Q. Doctor, if we may turn to the interferences for a moment and direct our attention to No. 73,959, No. 69,624, and I believe they have been characterized here in court as the Carbon and Carbide interference, and No. 70,341, which has been termed the Monsanto interference——

A. Let me ask about that Monsanto. There were two, I believe, that involved Monsanto. Just a bit further identification. Was that the Aroclor resin?

Q. That is the Aroclor, yes, Doctor.

These three interferences basically involve resin wax compositions; is that correct?

A. That is correct.

Q. And those resin wax compositions could be used for moistureproofing purposes?

A. Yes, I think so.

Q. And resin wax was a distinct departure from the
9541 original line of Charch moistureproofing compositions?

A. It was a departure in a sense that it made it unnecessary to use the components which were considered essential to come within the scope of the Charch and Prindle compositions.

Q. Doctor, I believe you testified that at the time of the declaration of those interferences du Pont felt that the subject matter involved was of extreme importance?

A. Yes, that was always my impression. We fought those interferences for a long time and quite vigorously. I don't think we would have done so if it had not been of some importance to us.

Q. You also have testified that in refusing to grant these companies any license to use these resin waxes on regenerated cellulose you were merely protecting your basic patent position?

A. Yes, I think I said something to that effect.

Q. Then you would feel that these resin wax compositions fell within the scope of the product patent?

A. Yes, at least the product produced by the use of the compositions would have.

Q. And that product again would have fallen within the scope of only the first six claims of the product patent; is that correct, Doctor?

A. I think that is true.

9542 Q. Now, Doctor, at the time of the settlement of these agreements neither side knew who was prior; is that correct?

A. That is generally true of most interferences.

Q. And in the two involving Carbon and Carbide du Pont was prior, and in the Aroclor involving Monsanto, Monsanto was prior?

A. That is right.

Q. Doctor, in all of these cases by the terms of the agreement these companies, Monsanto and, I believe, Union Carbide and Eastman Kodak, were prevented by the settlements from using these resin wax compositions to moistureproof regenerated cellulose; is that true?

A. That is right.

Q. Now, Doctor, could you tell us if and when any patents issued on the subject matter of those interferences?

A. I think the resin wax patent issued in 1939. That was nine years, approximately, after it was filed. The other patent, which was the parent case from which the resin wax specific patent was divided, issued simultaneously. They have consecutive patent numbers.

Q. Then they would not expire until 1956; is that correct, Doctor?

A. Seventeen years from 1939, yes.

Q. So then by the terms of those agreements, even though your basic product patent which you felt would have
9543 been infringed by the use of resin wax as a moisture-proof coating would have expired in 1946, Carbon and Carbide and Monsanto are still prevented up until 1956 to use resin wax to coat regenerated cellulose?

A. That has to be correct, yes.

Q. As I take it, Doctor, approximately 8 of these 15 interferences involved this resin wax subject matter?

A. That is true.

Q. Doctor, you testified on page 6507 of the transcript that "a defensive patent in our thinking was a kind of patent which would protect our use of the invention"; is that substantially correct?

A. That is substantially correct, yes.

Q. Could you tell us, Doctor, when this concept of a defensive patent developed within the du Pont Company?

A. I don't know when it developed within the du Pont Company, because, of course, patent practice was going on outside of cellophane fields and before I came to it, but in my experience in the Patent Service activities I was always under the impression that that was what was generally meant by a defensive patent.

Q. Do you have any approximation, Doctor, of the percentage of those 417 patents contained in the interrogatory which may be termed defensive patents?

A. Well, by definition all of them were defensive
9544 patents. We expected to use any of them that would be valuable in our operation.

Q. Dr. Smith, do you know how many patent applications have been filed which relate to cellophane since July 14, 1949?

Mr. GESELL. By whom?

Mr. FITZPATRICK. By du Pont.

A. I have no specific information, no.

By Mr. FITZPATRICK:

Q. You could not give us an estimate?

A. I don't know how many. I dropped out of the cellophane

picture in 1950 as an active participant in Patent Service activities. I could not hazard a guess as to how many had been filed. It would be purely a guess.

Q. But the function of a defensive patent is purely a protective one; is that correct, Doctor?

A. That is its fundamental objective.

Q. Could you give us any idea, Doctor, of the average cost to the du Pont Company of processing an application through to issue in the Patent Office?

A. Well——

Mr. GESELL. I assume you are talking about the cellophane patents?

Mr. FITZPATRICK. The cellophane patents, yes.

A. (Continuing.) Well, I don't know exactly how much it did cost to get a patent application through to an
9545 issued patent. It varied with the nature of the subject matter, the time that was required to develop it, the time that was required to prosecute it.

I think in speaking to our research people to justify the filing of a patent application we used to use the figure of something in the neighborhood of $800 to $1,000. We used to say to the research man, "If you feel that this is an invention that ought to be protected patentwise, it is similar to writing project for a research operation. Can you justify project to the tune of $800 or $1,000, and if so that is one thing we would like to know." I don't know how close to accuracy that figure was.

Q. Now, Doctor, could you tell us why if du Pont's aim in securing patents were fundamentally a protective one, why didn't they publish a disclosure in a trade magazine?

A. That answer is very simple. When you publish a disclosure in a trade magazine other people with similar activities in mind can very easily be spurred into filing a patent application in their own name in the Patent Office based on their research, I presume, although that would not necessarily have to follow; and if that application were filed within the statutory period prior to the—I should say after the publication it is one or two years, depending upon the time period we are talking about—that application would be a perfectly valid entry, and if that person were to
9546 acquire a patent we would be estopped from practicing our own invention regardless of the publication. We filed because we could get a publication by filing, which was one way of telling it to the world, and at the same time any patent protection which was rightfully ours as the first inventor would be available to us. That was protection to our operations as best we could foresee it, looking at it for an indefinite period of at least seventeen years, the life of the patent, if we got one.

Q. You mentioned perhaps fraudulent activities by other companies, Doctor. Isn't the same availability of the use of fraud possible in interference proceedings as in any other patent matters?

A. Oh, I suppose if anybody wants to be fraudulent they can use it under any circumstances they happen to get hold of.

Q. Doctor, are you familiar with the Commissioner of Patents' notice of January 25, 1949, involving abstracts?

A. Is that the notice referring to the publication of abstracts of abandoned patent applications?

Q. That is correct, Doctor.

A. Yes, I am generally familiar with it.

Q. Are you familiar with the fact that one of the reasons that that practice was adopted by the Patent Office was because various companies which wished to pursue a defensive patenting program were interested in such an order?

9547 Mr. GESELL. Of course, your Honor, he can't testify as to what was in the mind of the Commissioner of Patents.

By Mr. FITZPATRICK:

Q. Do you know, Doctor, whether or not du Pont in the cellophane field has availed itself of that abstract Commissioner's order?

A. I don't know that it has in the cellophane field specifically. It may have. I know that throughout the company since that Commissioner's order was posted there have been a number of abandonments of patent applications with publication of abstract. As a matter of fact, the authority to publish such an abstract is part of the approval that is granted by the Patent Board.

Q. You would not know how many in the whole company, though, would you, Doctor?

A. I haven't the slightest idea at the moment.

Q. Now, as I understand it, Doctor, you have also indicated that the customer use patents were in a sense defensive ones; is that correct?

A. Yes, I think so.

Q. And in your testimony on interferences, Doctor, you mentioned the Spaulding interference involving the protective grip handles. Do you remember that, Doctor?

A. Yes, I do.

Q. The patent involved, the Salley patent, was essen-
9548 tially a customer use patent, was it not, Doctor?

A. Yes, I think it was.

Q. And then du Pont would consider that a defensive patent; is that correct, Doctor?

A. Yes, I think by this time the definition includes it.

Q. And you also testified at transcript page 6566 that at the time of that interference "we thought there was an excellent field there"; is that correct?

A. I think that is right, yes.

Q. Now, Doctor, you settled the interference before du Pont knew who was prior; is that correct?

A. Yes.

Q. Would you tell us again briefly the terms of that settlement?

A. As I recall them, the terms of that settlement provided that a license under the du Pont patent would be granted to Spaulding which would be exclusive to them so long as the volume of business in that golf grip cover field exceeded a certain figure, and if it fell below that figure the license would become non-exclusive. To the best of my recollection, as I think I testified earlier, the volume never exceeded the figure that was set, and the license automatically became non-exclusive.

Incidentally, the agreement had no terms whatsoever which specified the source of the material.

9549 Q. By the terms of the agreement, Doctor, was it not true that du Pont reserved to itself an exclusive license to make and sell those tubes to Spaulding?

A. I don't recall that term of the agreement. It may be there.

Q. I show you Government Exhibit 2312, Doctor, the paragraph beginning at the bottom of page 1 and carrying over to the top of page 2.

A. In the last sentence of that paragraph the statement is made "du Pont expressly reserves to itself the exclusive right to make said protective coverings and to sell the same to Spaulding," if that is what you mean.

Q. Then, Doctor, doesn't that insure the source of supply of those coverings to be du Pont?

A. I suppose you could read it that way, yes.

Q. Could you read it any other way, Doctor?

A. Well, the only thing I can see there is if Spaulding had not wanted it that way they could have made any changes they might like, cancel the agreement, I suppose.

Q. That agreement, however, Doctor, settled an interference between Spaulding and du Pont, and by its terms Spaulding was given an exclusive license under any patent which du Pont might get, in return for buying all its materials from the du Pont Company as regards that particular subject matter; was that not true, Doctor?

9550 A. I guess that conclusion is justifiable.

Q. Is that your concept of a defensive patent, Doctor?

A. Well, let us not forget that this agreement was entered into in 1932. I was not too deeply indoctrinated in any kind of con-

cept on patent negotiations at that time. I think I testified that I had no personal association with this settlement agreement in the first place. I did know something about it.

Q. Doctor, did you know E. K. Bolton, Doctor?

A. Yes, I knew him and still do.

Q. What was his position with the company, sir, in 1932?

A. I am not sure, but I think Dr. Bolton was one of the officers of the Chemical Department at that time, a director of the Chemical Department.

Q. Chemical director?

A. Chemical director.

Q. In that capacity, then, he would be quite familiar with the cellophane patenting policy, would he not?

A. I don't know.

Q. Do you know, Doctor, that in 1932 Mr. Bolton in talking to Dr. Davidson of Carbide and Carbon Chemical told him—and that was at a time Carbide was thinking of going into the manufacture of a cellophane-like material—Dr. Bolton told Dr. Davidson that in his opinion anyone who tried to make cellophane
9551 would be in difficulty because of du Pont's strong patent position as well as its network of defensive patents?

A. I don't know that I have ever been familiar with that kind of statement at all, no.

Q. Now Doctor, of the 417 patents contained in the interrogatory I believe you stated that 368 relate to cellophane?

A. I recall that figure, yes.

Q. 68 of those were use patents?

A. Yes.

Q. And that left 300 of which du Pont used approximately 31 per cent?

A. That is correct, I believe.

Q. Now, Doctor, in response to questioning by defense counsel you stated various reasons for the non-use of patents by the du Pont Company. Among those I believe there were three categories which you discussed: commercial unavailability of materials, advance in technology or difficulty in moving from pilot plant to commercial production; is that correct?

A. Yes.

Q. And as an example of the last you referred to the Pitzl patent No. 2,432,542; is that correct?

A. That is correct.

Q. Doctor, have you any knowledge of approximately how many situations there were similar to Pitzl which resulted
9552 in non-use by du Pont?

A. I don't know that I could give you any figure right off the cuff but there were a number like it.

Q. Was it a substantial number?

A. I think there were more that would fall into the category of superceded technology or lack of commercial available materials than would fall into the Pitzl category where we ran into great difficulties and customer problems.

Q. But there were many instances of it?

A. Yes.

Q. You reached this figure of 31 per cent use of patents by du Pont by referring to the statistics in the interrogatories; is that correct?

A. Yes, I used those figures.

Q. And Pitzl was one of the patents which was in the interrogatory?

A. Yes.

Q. Would you look at the interrogatory and look under the Pitzl patent?

A. It says there we used it.

Q. It was used.

A. It was used. We had to use it to find out that it wouldn't work anymore and that is why we stopped using it. We used it only a short time.

Q. You have given that as an instance of non-use?

9553 A. I consider that to be a bona fide attempt to make the patent work and when we found we couldn't use it we dropped it. I will concede it is not a clean cut case of a patent never having been used. It seems to me it is illustrative of our attempt to use it if we could.

Q. In other words, the interrogatory does not illustrate the extent of the use of patents by du Pont; is that correct?

A. That, I think, is correct. The question was asked, did du Pont at any time ever use these patents, and we said yes or no as the case might be.

Q. They may have used it for a day or an hour but it would go in as "yes" into the interrogatory?

A. If we used it commercially or attempted to use it commercially. Experimental uses didn't get into that.

Q. In computing the figure of 31 per cent use of patents by du Pont, situations like Pitzl were included in such patents that were used?

A. Yes, I think it is there, because I didn't have an opportunity to segregate all of the different types of use when I made up that figure.

Q. If situations like Pitzl and other patents which had not been used to any great extent were excluded from your figures, the figure of 31 per cent would be quite a good deal lower?

9554 A. I don't think it would be too much lower.

Q. It would be lower?

A. Around 25, I don't know.

Q. You testified that of 368 patents which related to cellophane 256 were in force as of January 1, 1952; is that correct?

A. Yes, according to my account that was the figure?

Q. Could you tell us how many of those patents were actually being used by the du Pont Company as of that date?

A. I haven't segregated that group, no. I could tell you if I had opportunity to study my charts.

Q. Would you refer again to the letter marked Government Exhibit 2919 for Identification? Does that not state that it encloses a list of patents in table 1 which were being used as of March 15, 1948, by the du Pont Company?

A. It states that table 1 lists the U. S. patents owned by du Pont and involved in the manufacture of cellophane by du Pont as of March, 1948.

Q. How many are in that list?

A. I will have to count them. There are 34 patents listed here?

Q. 34?

A. Yes.

Q. And in 1952 there were 256 patent instances; is that correct?

9555 A. Yes.

Q. Do you suppose du Pont was using more than 34 in 1952?

A. That I don't know. You have included in this list some patents which were used in the manufacture of cellophane but which weren't specifically moistureproof cellophane. You recall some of my figures on uses were concerned with moistureproof cellophane.

Q. The figure of 31 per cent for overall use of cellophane patents involved plain and moistureproof; isn't that true?

A. Yes.

Q. Wasn't it true in 1948 du Pont was using only 10 or 12 of its patents in cellophane?

A. I don't follow that. The figure which I used in arriving at that percentage involved 93 patents which were in use at some time during their life, and if we used the list which you have there as things which were actually in use in 1948, the percentage is reduced to some figure such as you suggest.

Mr. FITZPATRICK. Thank you, Doctor.

The COURT. We will take a five minute recess.

(At this point a brief recess was taken.)

9556 Redirect examination by Mr. GESELL:

Q. Doctor Smith, when you were on the stand Friday the Court suggested that you compile certain statistics which Mr.

Fitzpatrick had asked for, and he didn't ask you for them again today. Have you compiled them?

A. Yes, I have.

Q. They related to how many cellophane patents there were belonging to or controlled by du Pont prior to 1929. What was that number?

A. Well, the count I made turned up fifty-one patents in force as of the close of 1928 under which du Pont acquired rights of any kind. Now, rights actually acquired by du Pont prior to that date involved nineteen patents, of which seventeen were assigned or exclusively licensed to du Pont.

Q. By the way, Doctor Smith, how many patents are there today throughout the cellophane art in the United States?

A. I would not hazard a statement as to the exact number, but I would say that it is probably in the neighborhood of seven thousand.

Q. Mr. Fitzpatrick asked you whether after 1946 Carbide and Monsanto were not by their agreement prevented from using the resin wax patents. Do you recall his question with respect to that?

A. Yes.

9557 Q. And you said they were by the agreement?

A. By the agreement.

Q. Were those patents on the register and available for license to Carbide and Monsanto if they wanted licenses under them outside the agreement?

A. Yes, they were.

Q. Did they ask for licenses?

A. No.

Q. Now, Doctor Smith, I want to discuss with you the testimony on cross-examination with respect to the fourth paragraph of Government Exhibit 2190 concerning which you were questioned by Mr. Fitzpatrick, and you were asked whether that paragraph did not indicate your motive on at least one occasion for suggesting why du Pont should take a license from Sylvania. I would like you just in your own words to tell us what the problem was involving this non-exclusive cross-license under the rancidity protection patents, what you had to do with negotiating the license, what the course of your discussions was, and how the matter worked out so we can have all the story and not just a part of it.

A. Well, the problem originated with the issue of the Morgan patent, and a few days after it issued an officer of Sylvania wrote to the management of the Cellophane Division calling attention

9558 to the patent and citing an incident of our sale of a commercial product which it was alleged was an infringement

of the Morgan patent, and asked us to cease and desist from infringement.

Well, we acknowledged the letter. I believe the Cellophane Division manager did that. And Patent Service was instructed to look into the problem and see what could or should be done about it. We examined the patent, the Morgan patent, its file history, looked into what our activities had been, and concluded that the infringement charge specifically stated by Sylvania was not true.

However, this involved a film which we were manufacturing at that time known as Tango plain cellophane. Having read the claims of the Morgan patent we concluded that there was some question of infringement that probably ought to be settled before we continued with the sale of that material, and so we asked the Sales Division to stop selling any more Tango film until the matter was cleared up.

It was something of a surprise to us to discover that this orange colored film that we had been selling for some little time came anywhere near being a rancidity protective film. We didn't think it did and it is not a very good one either.

About that time or while we were studying that situation the Hunter patent was brought to issue with claims which were in the same field as Morgan and there was some conflict. It
9559 seemed to us that the claims allowed to Hunter probably dominated the claims allowed to Morgan.

Q. The Hunter was a du Pont patent and the Morgan patent was a Sylvania patent; is that right?

A. That is correct.

Q. Did you play any part in the negotiations that followed with Sylvania?

A. Oh, yes, I was personally involved in the whole thing.

Q. Then you tell us what happened in those negotiations, who you saw, what you did about it, what you were trying to get and how you got it.

A. The Cellophane Division manager sent a notice to the Sylvania management calling attention to the issue of the Hunter patent and referring back to the notice of the Morgan patent and saying that we probably ought to discuss this matter and discover what ought to be done about it, and I was assigned the responsibility for making arrangements for a discussion with a representative of Sylvania. I did that, and I went down there with the hope of making some kind of arrangement whereby I could go back to our Sales Division and say "Go ahead and sell your Tango film."

I made the appointment with Doctor Wade in New York at the offices of Sylvania, and I remember the situation as clearly as

though it had happened last week. It was my first personal contact with any representative of Sylvania."

9560 Despite the appointed hour I waited—well, it seemed interminably, but I suppose it was not more than a half hour—for Doctor Wade to appear in the conference room to which I had been ushered upon my arrival. He came in and greeted me, and in a rather—well, I don't know, I guess I can best describe it as an officious manner, he pointed out that he had no authority to make any commitments with respect to the company, but one of the first things he wanted to settle was this question of infringement and interrelationship between the Hunter and the Morgan patents. I said "All right, go ahead."

He pointed out that this Tango film ought to come within the scope of the Morgan claims, and after considerable discussion why, as I recall it, I said, "Well, let us assume that it does. Let us get on."

Then he began to try to impress me with a number of photostatic diagrams as to the theoretical possibilities of the practice of the Hunter invention infringing the Morgan patent, and I finally had to admit that theoretically it was possible, but I didn't see how it would be practicable. He then went on to say, "All right, now that we have gotten this infringement and domination situation rather cleared up we ought to arrange a license whereby either of us could manufacture this type of film, since both patents seem to be involved."

I said "Yes, that is what I came down for."

9561 I wanted access to the Morgan patent so that I could continue with the sale of Tango film.

During that discussion I urged that Dr. Wade—that he might be stretching the scope of the Morgan claims a little bit to include this Tango film, and I said, "If you do that, we have been selling it, so there might be a question of validity of the Morgan claim." We interpreted it that broadly.

He looked over his glasses at me at the time and he said, "Well, let us not get into that, but I might be able to say something about the validity of the Hunter claim."

That, incidentally, is the basis for this remark in that memorandum which should have said possible invalidity of claims of both patents. Simply a matter of expressed thought in the course of the discussion.

It was finally agreed as a result of that discussion that we, du Pont, would draft up a license agreement, and that was done.

Q. Now, just cutting your story at this point a minute, is this letter of March 2, 1937, to Dr. Wade signed by you attaching a draft of proposed license the contract which you submitted following that discussion?

A. Yes, that is our file copy.

Q. That provides for completely non-exclusive cross license agreements?

A. It was a simple, straightforward exchange of non-
9562 exclusive, royalty-free licenses.

Mr. Gesell. Will you mark this as Defendant's Exhibit 1004 for Identification?

(The letter of March 2, 1937, from W. W. Smith to Dr. Wade was marked "Defendant's Exhibit No. 1004 for Identification.")

Q. Is that what you proposed following your meeting with Dr. Wade?

A. Yes, it was submitted by us to Dr. Wade as a result of our conference.

Q. Will you go on and tell us what happened after that in the course of the discussion?

A. Shortly after that was submitted to Dr. Wade we got back a revised agreement to which Sylvania had made some changes such as they wished to have. One of the changes in the agreement, as I recall it, had to do with the fixation of a price differential between plain cellophane and rancidity protective cellophane. Another proposed change was a pair of reciprocal paragraphs which would limit the licensing of either or both of those patents with respect to third party manufacturers as distinct from the customers of either party who would need the right to use what du Pont or Sylvania would sell to them. This was directed at limiting the licensing to third party manufacturers.

Q. Neither of those provisions were in your proposal,
9563 were they?

A. Oh, no, not at all. The price fixing agreement we slapped down very hard and had nothing to do with it. We didn't like the proposal with respect to third party licensing.

With the help of one of our patent attorneys we devised some substitute paragraphs which perhaps went part way in the direction that Sylvania had sought, and then I submitted that revised agreement, returning the original that Sylvania had submitted—we didn't want any part of it—to Sylvania, and then we agreed upon a second conference with Sylvania.

Q. Did you attend that conference?

A. I attended that conference.

Q. With whom was it, where did it take place, and what was said?

A. The conference was with Dr. Wade in New York in the Sylvania offices, the same room as the first conference. There was one other person present assisting Dr. Wade—Swanson, was his name, I believe. He was there as an assistant to Dr. Wade.

I pointed out to Dr. Wade that we were not at all sympathetic with this third party licensing maneuver at all. Why was he driving at it?

Well, he brought out some samples of film. They were a
9564 colored film of some variety. I think they were amber colored. I don't know for sure. He said that this was some film that had been made by the Celluloid Corporation. He assumed it was a cellulose derivative film, and he had had an outside laboratory test the light transmission characteristics of that film, and the report indicated that the light transmission properties came within the scope of the limits suggested within both the Hunter and the Morgan patents, bearing in mind that rancidity protection is a function of the type of light which is transmitted by the film. He said that it seemed very important to him that steps be taken to prevent other people like Celluloid Corporation from manufacturing this kind of film, and he was quite insistent on having some provision in the agreement.

I told him that I didn't think it would work, but since he insisted and since, you will remember, I was after a license to permit us to make Tango film or rather to sell it for use as a rancidity protective film, if that is what it was—we didn't care whether it was or not—he insisted that we have this protection against third party manufacturers, and I said, "Well, the best I can do is to take the paragraph that you might think desirable back to my management and see what they will say."

Q. Was it or was it not at that point that you wrote——

A. It was.

Q. (Continuing.) Government Exhibit 2190 that we
9565 have been discussing?

A. Yes, it was at that point.

Q. And why did you put in in the fourth paragraph the words that Mr. Fitzpatrick liked so much, which say, "We approached Sylvania with the proposition of a cross license which will enable both of us to operate and at the same time keep others out of the field"?

A. That was an attempt to pass on to management in this brief statement some of the details that I have just recited. Sylvania was insistent upon some limitation of third party manufacturer. I was insistent on a license under Morgan so I could tell Oliver Benz to go back and sell his Tango cellophane, and if Sylvania insisted on that in order to give me the license I needed, I was just stuck. I had to do something more about it.

Q. You didn't state in your report, Dr. Smith, that you had proposed a non-exclusive arrangement and had been turned down, did you?

A. No, I guess I didn't. I tried to keep the letters to management as short as possible.

Q. What happened after you submitted this? Were there other discussions?

A. Oh, yes. The management in accordance with the policy of that day thought that if this was the best we could do they would be reasonably willing to go along with it. We sub-
9566 mitted it then to the Legal Department for approval which must be obtained before any agreement can be executed, and the Legal Department refused to approve the agreement with that provision in it, a provision limiting third party manufacture.

Q. Then what happened?

A. So I went back to Wade in correspondence pointing out that we could not get approval for the document as presented. He wrote back pointing out that he could not understand why we could not get together on this thing and suggested a couple of more paragraphs that might be used of essentially the same character.

Q. His reply is Government Exhibit No. 2194 which I show you, is it not?

A. Yes. That at least appeared at about this stage of the negotiations.

Q. What happened after that?

A. Well, that letter stated in its concluding paragraph that it was not the wish of his management to execute an agreement which did not have in it provisions limiting third party manufacture. I gave up. I didn't want it, but I went to our management and said, "Here is the ultimatum from Sylvania."

There was a preceding paragraph in that letter which suggested perhaps we could use the idea of putting in a limiting paragraph on thirty days' notice to the other party of
9567 the grant of a license, the thirty days being prior to the effective date of the license.

Well, in view of the fact that Sylvania stated they would not execute an agreement without these provisions, we concluded that the best way we could get the license we needed, namely, just the right to make Tango film and sell it, would be perhaps to string along with that suggestion.

Q. That was the suggestion of giving notice before licensing anyone else?

A. That is right, and so the final agreement was executed, I believe, with that provision.

Q. Did you negotiate that provision?

A. No, that was suggested by Wade and was accepted and put in there as a sort of a desperate measure to get what we thought we needed.

Q. To your knowledge was there any understanding outside the four corners of the agreement that it would be exclusive rather than non-exclusive as it was written?

A. No, indeed, there was never such a thing.

Q. Do you know of any understanding that prohibited you from licensing your Hunter patent to others after notice to Sylvania?

A. No, indeed.

Q. In the course of these discussions, did you ever indicate to Mr. Wade or say to Mr. Wade or did you believe
9568 that all of the claims of the Hunter patent were invalid?

A. No, indeed. The full extent of the statement with respect to validity was embraced in that part of my earlier testimony.

Mr. GESELL. I would like to offer Defendant's Exhibit 1004 in evidence. I have no further questions.

(The letter and form of agreement attached from W. W. Smith to Dr. Wade dated March 2, 1937, was received in evidence and marked "Defendant's Exhibit No. 1004.")

Mr. MINICUS. No further questions of this witness, your Honor.

Mr. GESELL. We will have Dr. Reichel here Wednesday at Mr. Minicus's request for further cross examination.

The COURT. Adjourn court to 10:00 o'clock Wednesday.

(At this point the trial was adjourned to Wednesday, April 23, 1952, at 10:00 o'clock a. m.)

* * * * * *

9570 WEDNESDAY, APRIL 23, 1952, 10:00 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. Your Honor, Dr. Reichel is here at Mr. Minicus' request.

The COURT. Proceed.

FRANK H. REICHEL (Resumed).

Re-cross-examination (cont.): by Mr. MINICUS

Q. In the course of your cross-examination on April 9 you were asked the following question: "You have testified that Sylvania lived up to this agreement in every respect. And you further testified that the Sylvania Corporation never considered its right to manufacture and sell moistureproof cellophane restricted as to quantity by virtue of the moistureproof agreement of April 26, 1933. Was the reason for this that the Sylvania Corporation officially considered the agreement in its entirety violative of the anti-trust laws and unenforceable under the Sherman Act?"

Your answer to that question was an unqualified "no."

Is that your testimony at the present time?

A. It is.

9571 Q. You were further asked upon cross-examination whether within the past three years the Sylvania Division had, through its representatives acting in their official capacities made representations to officials of the United States Government that the moistureproof agreement of April 26, 1933 violated the anti-trust laws and more particularly the Sherman Act, and your response to that question was, "Not to my knowledge." Does that continue to be your testimony?

A. Yes.

Q. Finally you were asked if you had ever seen an affidavit by Mr. George Hills in connection with that claim of Sylvania against the United States Government. Again your response was an unqualified no. Is that your testimony?

A. It is.

Mr. MINICUS. I have here a document and I request that it be marked Government Exhibit 2917 for identification.

(The document addressed to the Bureau of Internal Revenue dated April 31, 1949, being an Application for Relief under Section 722 of the Internal Revenue Code by the Sylvania Industrial Corporation was marked "Government Exhibit No. 2917 for identification.")

By Mr. MINICUS:

Q. I will show you Government Exhibit No. 2917, marked for identification, which is addressed to the United States Bureau of Internal Revenue dated April 31, 1949, and certified

9572 as a true copy by the Treasury Department on April 11, 1952, and then will ask you is the subject matter of this document noted to be application for relief under Section 722 of the Internal Revenue Code by the Sylvania Industrial Corporation (handing to witness). You may hold onto this, Dr. Reichel. The subject that I refer to is right at the top of the exhibit.

A. Yes, sir.

Q. Is that the subject, sir?

A. It is.

Q. Now, kindly turn to the end of the body of this instrument at page 12, the pagination being marked at the top of the pages, and I ask you to state whose signature is there subscribed.

A. That is my signature.

Q. I didn't hear you, sir.

A. My signature.

Q. I now request you to turn to the next page and ask you if that page contains an affidavit to the effect that Frank R. Reichel has read the foregoing and to the best of his knowledge and belief the facts alleged therein are true and correct?

A. What page is that?

Q. That is page 14, following page 13 that you just looked at.

A. Yes, that is also my signature.

9573 Q. I beg your pardon?

A. That is my signature also.

9574 Q. Did you subscribe and swear to that affidavit on September 7, 1949?

A. I am sure I must have.

Q. Pardon me?

A. I am sure I must have.

Q. Now, Dr. Reichel, do you have a definite recollection that you submitted written testimony before the Bureau of Internal Revenue in 1949?

A. Not personally, no.

Q. This is your signature on this statement?

A. It is my signature, but it is prepared by these other people for my signature.

Q. This is your affidavit: You have read the foregoing and, to the best of your knowledge and belief the facts alleged therein are true and correct. Is that right?

A. It is right, I suppose, but I am asked in my position to sign many papers.

Q. Did you swear to that statement, Doctor?

A. Yes.

Q. Was a hearing held at the offices of the Bureau of Internal Revenue on June 9, 1949, primarily for the purpose of discussing a patent license agreement entered into between Sylvania and the du Pont Cellophane Company in 1933 relating to moistureproof cellophane?

A. It could be. I wouldn't know.

9575. Q. Would you kindly turn to the first sentence of this report, Doctor, on page 1, under the subject headed "Gentlemen"?

A. It so states here.

Q. And you, in your affidavit, swore to the fact that that statement was true and correct to the best of your knowledge and belief?

A. That is right.

Q. Was the American Viscose Company represented at this hearing by its treasurer and secretary Mr. William H. Brown and by the head of its tax department, Mr. A. J. Toussaint?

A. Yes, it so states here.

Q. Will you kindly state, Doctor, what were the facts attendant upon this hearing which Sylvania had before the Bureau of Internal Revenue?

A. I don't recall.

Q. Do you recall the nature of the claim?

A. Very little about it.

Q. Can you tell us what you do recall?

A. All I recall about the claim was that the basis for it was that during this 1936-1939 period we were adding a considerable number of additional casting machines. I think 5 or 6 in number. We were rehabilitating and widening the old machines and we felt that our earnings during that period were abnormally low. As I recall, that was the basis for the claim.

9576 Q. Was it a claim for a rebate from the United States Government based on excess profits taxes paid during the war period?

A. Yes, that is right. I don't know about the war period. I assume so.

Q. Paid during the period that the excess profits tax law was in effect?

A. Yes, that is right.

Q. Other than yourself do you recall who else submitted testimony at this hearing on behalf of the applicant Sylvania or the American Viscose Company?

A. Mr. James D. Miller handled the case for us. I don't recall the others.

Q. Do you recall whether Mr. Replogle submitted any testimony in this matter?

A. No, but he could have.

Q. Do you recall whether Mr. Stiner submitted any testimony in this matter?

A. No.

Q. Do you recall whether Mr. Hills submitted any testimony in this matter?

A. No.

Q. What was the amount of the claim for rebate that the Sylvania Division made against the United States Government?

A. As I recall it, roughly $1,000,000.

9577 Q. $1,000,000 claim. Subsequent to June 9, 1949, that is the date of the hearing, were certain affidavits submitted by Sylvania in the prosecution of its claim against the United States Government which affidavits became a part of the record of that proceeding?

A. I understand this morning there was one by George Hill.

Q. Will you kindly refer to page 1 and the top of page 2? The statement I have reference to is under (a) on the last line of page 1. Does it not say there in the statement you were sworn to that, "affidavits covering this subject matter by sales personnel of Sylvania Industrial Corporation during the base period," and a "record of the casting units which was submitted?

A. Yes, sir.

Q. Does it not also say further that, "affidavits by Harry H. Replogle, who was vice president in charge of sales, and also by C. B. Stiner, a highly competent salesman," was submitted?

A. It does.

Mr. MINICUS. I request that this document be marked Government Exhibit 564 for Identification.

(Certified copy of affidavit of Harry H. Replogle was marked "Government Exhibit No. 564 for Identification.")

By Mr. MINICUS:

Q. I will show you Government Exhibit 564 for Identi-
9578 fication and ask you if this is a certified copy of the affidavit of Harry H. Replogle, subscribed with his signature, and presented in support of the tax claim by Sylvania against the United States Government.

A. This appears to be Mr. Replogle's signature.

Q. Is that his affidavit?

A. I would think so.

9579 Mr. MINICUS. I request that this document be marked Government Exhibit 565 for identification.

(Certified copy of affidavit of Clarence B. Stiner was marked "Government Exhibit No. 565 for identification.)

By Mr. MINICUS:

Q. I will show you Government Exhibit 565 for identification and ask you if this is a certified copy of the affidavit of Clarence B. Stiner, subscribed with his signature and presented in support of the tax claim by Sylvania against the United States Government (handing to witness).

A. Yes, it is.

Q. Will you describe Mr. Stiner's connection with Sylvania, sir?

A. Mr. Stiner started with Birn & Wachenheim, the Sidac agents in New York, back in the early twenties and then later came over to Sylvania and had charge of I think we called converter sales and special accounts in New York and later after more or less as New York sales manager.

Q. Is he presently with your organization?

A. No, he is very ill and hasn't worked for us for about five or six years.

Mr. MINICUS. I request that this document be marked Government Exhibit No. 2198 for identification.

(Certified copy of affidavit of George S. Hills was marked, "Government Exhibit No. 2198 for identification.")

9580 By Mr. MINICUS:

Q. I will show you Government Exhibit No. 2918 for

identification and ask you if this is a certified copy of the affidavit of George S Hills, subscribed with his signature and presented in support of the tax claim by Sylvania against the United States Government (handing to witness).

A. In connection with this affidavit I am not quite sure of what you meant by your question. I saw this affidavit for the first time at breakfast this morning. Whether your question referred as of the previous date or whether it referred as of today, I couldn't quite tell, but I did see this affidavit this morning at breakfast time.

Q. Will you, sir, kindly turn to page 9 of your own statement submitted in this matter——

A. Page 9 of what?

Q. Government Exhibit 2197, the first one I gave you in this matter.

A. Yes.

Q. Next to the last paragraph, sir, the last sentence, does it not state there, "An affidavit of George S. Hills, relative to his opinion is submitted herewith."

A. Yes, but I didn't say I read it.

Q. You submitted this affidavit, your statement sworn to that you had read it——

A. No, I didn't swear that I read this affidavit.

9581 Q. You had read your own statement. You had read this statement that you submitted.

A. I must have. I said I did.

Q. And you did not turn to the affidavit that was submitted with it?

A. I am very sure I didn't because this morning is the first time I ever saw this affidavit of Hills'.

Q. Will you describe Mr. Hills' connection with Sylvania?

A. Sylvania was organized in April, 1929. Our legal firm was Menken & Ferguson and later Menken, Ferguson & Idler in New York, 44 Wall Street. One of the attorneys in that firm was George S. Hills. Stanwood Menken was the head of the firm and was made vice-president of Sylvania and assisted in the organization of the company. George Hills of that office, however, was made secretary. Sometime later—I don't remember the date—George Hills left Menken and set up his own office and continued as secretary of Sylvania and became sometime in the early thirties, general counsel for Sylvania and continued as general counsel up until the time of the merger in '46.

Q. He has had no connection with Sylvania since that time?

A. As a director of Viscose.

Q. Now, sir, will you kindly turn to page 8 of your statement—

and we will continue with that—and state whether there is
9582 a subheading on that page, "Legality of Dupont license agreement"?

A. Yes, there is.

Q. Under that heading does the statement appear that, "Prior to the base period it had been concluded by Sylvania that the restrictive provisions of the Dupont license agreement were illegal and unenforceable?"

A. You have to read that along with what follows.

Q. I intend to come with what follows. I asked you, is that statement there?

A. That sentence is here, yes.

Q. Let's clear that up first. That says "prior to the base period this conclusion was reached." When did the base period commence, Dr. Reichel?

A. '36.

Q. So prior to 1936 this conclusion had been reached?

A. Yes, I think in 1935 that statement was made.

Q. Is it not true that in 1935 Sylvania desired to market a block of its stock, or the stock of a stockholder, to be more exact, valued at $2,650,000?

A. I don't know that it was that way. There was a block of stock held abroad amounting to 100,000 shares. I think the foreign owners either wanted or were willing to sell that stock and Dr. Wallach probably thought that it would be wise to increase the American interest in the company. I think that is probably more nearly correct than the way you put it.

9583 Q. Now, you called my attention to what followed the statement we were just discussing. Does it not say down there on the third line from the bottom that the offering price aggregated $2,650,000?

A. I didn't question the figure. I questioned this, "In 1935 the late Roger Wallach, then president of Sylvania, was approached by a large foreign stockholder who wished to sell 100,000 shares of Sylvania capital stock on the American market to get dollar exchange." In other words, it was really they that wanted to sell the stock.

Q. I understand.

Now, was any mention made of the royalty provisions in the Dupont-Sylvania agreement or any restriction on production? Did that appear in the prospectus under which these securities were offered to the public?

A. I don't think so.

Q. Will you turn to page 9, sir, the next to the last paragraph on the page beginning "When Dr. Wallach consulted"—does it not say there that, "Accordingly, Dr. Wallach advised the foreign

stockholder in the banking group that the provisions of the Du-Pont agreement would not interfere with the continued progress of Sylvania and no mention of these restrictions was made in the prospectus under which the securities were offered to the public"?

A. Well, as a practical matter that was right.

9584 Q. This is still your statement we are working with, is that correct, Dr. Reichel?

A. That is the one I signed.

Q. Did Dr. Wallach approve this omission because he had been advised by his counsel that the restrictive covenants of the agreement were in violation of the anti-trust laws and therefore void and unenforceable?

A. I wouldn't know.

Q. Will you again refer to page 9 of your statement, just before the sentence we just read. Does it not say there, "When Wallach conferred with counsel he was advised that in the opinion of counsel the restrictive covenants of the agreement were in violation of the anti-trust laws and therefore void and unenforceable?"

A. I wouldn't know.

Q. Will you again refer to page 9 of your statement, just before the sentence we just read. Does it not say there, "When Wallach conferred with counsel he was advised that in the opinion of counsel the restrictive covenants of the agreement were in violation of the anti-trust laws and therefore void and unenforceable?"

A. That is what it says here.

Q. And this is your statement?

A. I signed it.

Q. In reliance upon the conclusion that the Dupont-Sylvania agreement of April 26, 1933, in the field of moistureproof cellophane was unlawful, did Sylvania take affirmative action by omitting to mention the quota restrictions upon its production and sales in a prospectus published by certain investment bankers in 1935?

A. I wouldn't know.

Q. Will you again refer to page 9 of your statement,
9585 Dr. Reichel. Does it not say in the third line from the bottom of the paragraph we have been reading, "And no mention of these restrictions was made in the prospectus under which these securities were offered to the public?

A. That is right.

9586 Q. Did Sylvania ever officially make representations of its conclusions that the moistureproof agreement was unlawful except under the circumstances of this sale of stock in 1935?

A. I wouldn't know of any case except in a continuation of the 722 case in Washington.

Q. Then the only other time you know of was in the hearing of the 722 case?

A. That is right.

Q. Was one of the facts upon which Sylvania based its conclusions of illegality that the terms of the moistureproof agreement were designed by means of royalty provisions to restrict the quantity of moistureproof cellophane which Sylvania could sell?

Mr. GESELL. I object to this line of questioning. No foundation has been laid for it. If I may examine the witness on voir dire, 3 or 4 questions, it would be perfectly apparent that the witness has no knowledge of these facts at all, and this is an indirect way of getting into the record facts which are not admissible on their case as to which the witness has no knowledge.

Mr. MINICUS. Your Honor, I see no reason for voir dire. We are not offering these documents. The witness is being questioned on his own statement that is sworn to.

9587 We are following this line of questioning to refresh the witness's recollection of what he has stated, signed and sworn to and submitted to the Treasury Department. He says today he has no knowledge of these facts, but less than three years ago he read this statement, signed it at its conclusion and swore that he had read the contents and they were true and correct to the best of your knowledge and information.

Mr. GESELL. As I understand the law, where a document is used to refresh a witness's recollection and in that way is read by the examining attorney the opposite side can question on the voir dire to see if there is any basis on which this argument would refresh the witness's recollection, and if it appears on the voir dire that he has no knowledge of these events at all then this indirect way of getting these facts into the record is improper.

The COURT. I think you correctly state the law in that respect. Suppose you hand the witness the New York Times of last year and he starts giving a line of testimony. I think the opponent has a right to see why that copy of the New York Times of last year spurs his recollection.

I think Mr. Gesell's statement of the law is correct, as I understand the law of evidence, so you may proceed with your voir dire.

By Mr. GESELL:

Q. Doctor, taking this document 2915——

9588 A. Which one is that?

Q. Which is the statement that bears your affidavit signature at the end.

A. Yes.

Q. And directing your attention to the paragraph beginning on page 8 entitled "Legality of du Pont License Agreement" and

it continues over until the heading "Other Considerations" on page 9, do you have any personal knowledge of any of the facts there recited?

A. None regarding the sale of that stock. I had no part in that whatsoever.

Q. Did you have any part in the opinions that are there discussed?

A. No part whatsoever.

Q. Did Mr. Hills ever give those opinions to you in any way?

A. No.

Q. Did Mr. Wallach ever report what Mr. Hills said to you in any way?

A. No.

Q. Did you ever have any personal knowledge of these events?

A. No.

Q. Does this section of the document I have shown you refresh your recollection about anything?

9589 A. No, because I have no recollection.

Mr. GESELL. I renew my objection on the basis of that voir dire.

The COURT. Objection to what? The documents have not been offered yet.

Mr. GESELL. But to the questions which read this paragraph by paragraph when the witness says, I don't know or I have no recollection, and asking him isn't it a fact thus and so.

I think that is an improper line of questioning in view of the witness's lack of knowledge of the facts. Just like he could not take the New York Times and read a heading from the financial page, wasn't it a fact that it was 2,600,000?

The COURT. It seems to me on the basis of what we received from your voir dire examination, no matter what question Mr. Minicus asks it would have no probative value because if the witness doesn't know——

Mr. GESELL. I suggest it is not a proper way to get this document in by reading in effect provision after provision in the questions. They don't go to anything, they are not a probative and they don't put us forward in any way.

The COURT. I am not ruling at this time on whether documents are admissible because they have not been offered as yet.

Mr. GESELL. Perhaps we can wait for the next question and if I have an objection I will state it.

9590 The COURT. Very well. You proceed, Mr. Minicus.

By Mr. MINICUS:

Q. Was one of facts upon which Sylvania based its conclusion of illegality that the terms of the moistureproof agreement were

designed by means of royalty provisions to restrict the quantity of moistureproof cellophane which Sylvania could sell?

Mr. GESELL. I object to the question on the ground that the witness possesses no knowledge of the fact on which they base that opinion at all.

Mr. MINICUS. We can refresh him whether he had knowledge of this and I can have recourse to this document that he signed and swore to in a claim involving $1,000,000 your Honor.

The COURT. I think the question is permissible. Objection overruled. Proceed, Mr. Minicus.

Will you clear for me so I can follow this line of testimony, what is the connection between the illegality, the alleged illegality of the agreement, du Pont vis-a-vis Sylvania and this request for a refund for taxes?

Mr. MINICUS. It arose during the tax case about whether Sylvania's profits during the excess profits period could have been the result of normal growth of the corporation; that is, there was an exception under section 722 of the Internal Revenue Act for extra profits resulting from normal growth of corporations.

9591 They weren't considered quite the same extent to be excess profits resulting from the war emergency.

Sylvania, among other arguments, used this argument of normal growth. The representatives of the Bureau of Internal Revenue said, how can you plead normal growth under any circumstances when your growth was precluded by the restrictive clauses in the agreement with du Pont? They said, your growth could not grow normally because you had to stay within the restrictions described in these royalty provisions. They said, we didn't because the royalty provisions didn't count. We considered the whole agreement illegal and violative of the Sherman Act, therefore unenforceable. Therefore we never considered ourselves restricted in the quantity of our production by the effect of these provisions.

We are not adopting their position. We are saying that is the statement that they made to the Bureau of Internal Revenue.

The COURT. Did they advise du Pont that they considered the agreement at an end because it was considered illegal?

Mr. MINICUS. My questioning is designed to develop that.

Mr. GESELL. There isn't evidence to support what Mr. Minicus said either, your Honor.

9592 The COURT. We can't have one actor in the drama doing all the talking. Sylvania says this agreement was illegal for the purpose of collecting money back from the Government. I don't know how far that can bind du Pont unless they had told du Pont they had considered it illegal.

Mr. MINICUS. The statement will also show some of that.

The COURT. Proceed.

Mr. Minicus. There are several grounds on which I consider it to be admissible. In the first place, we have always claimed from the beginning that as to this agreement in the field of moisture-proof cellophane Sylvania was a co-conspirator with du Pont and that these are the statements of a co-conspirator made in the course of the development of the conspiracy.

The second point is this: this witness has claimed that he has complied with this agreement in every respect. He has also said it was, in his opinion, the agreement was not unlawful. This, we claim, shows a prior inconsistent statement.

Mr. Gesell. He has not testified that in his opinion it was not unlawful. The so-called impeaching question was, was not this agreement in all its respects officially considered violative of the Sherman Act in the Sylvania organization? And he said, no. His opinion as to the legality was not asked and he didn't give any opinion as to the legality.

9593 Mr. Minicus. We will resort to these affidavits to show that representatives of the Sylvania Corporation and the Sylvania Division acting in their official capacities did make these representations. That is the only way we can do it. He said an unqualified no, they didn't make any such representations.

Mr. Gesell. Your Honor, as to whether this is admissible on the Government's rebuttal case, I think that is an important question because it goes to the scope of this whole examination.

If this material is not admissible on their case, as your Honor indicated the other day when a comparable question came up, then much of this examination should be stricken and I am prepared to argue now a number of very clear grounds on which I think the question of which these attorneys bought on the price they filed with the Treasury Department they gave to bankers to facilitate the floatation of a stock issue had nothing to do with this case and is not admissible. Perhaps we can argue out the admissibility of that at this stage in order to see what the scope of this questioning should be.

The Court. You haven't offered them yet.

Mr. Minicus. No. At the present time I am questioning the witness. He answers repeatedly, he doesn't know, and I refer him to his prior statement to attempt to refresh his recollec-

9594 tion. If he has no recollection at all, I am going to put in his past recollection recorded.

The Court. He has stated that he has no recollection of the statements that counsel has referred to.

Mr. Minicus. So far he has no recollection.

Mr. Gesell. He never did have.

Mr. Minicus. He must have had it when he read it and swore to it and said it was correct to the best of his information and

belief. This is a sworn statement. This is not somebody reading the New York Times in the morning. There was $1,000,000 at stake. This witness came in and signed his name at the end of the statement and on the next page he made an affidavit to the effect that he had read the contents and they were correct to the best of his knowledge and belief.

The COURT. There is no pending question. This colloquy that is taking place results from a question I put to you. So proceed, Mr. Minicus.

By Mr. MINICUS:

Q. Was one of the facts upon which Sylvania based its conclusion of illegality that the terms of the moistureproof agreement were designed by means of royalty provisions to restrict the quantity of moistureproof cellophane which Sylvania could sell?

A. Theoretically they were restricted but as a practical matter they weren't. That is the only way I could answer that.

Q. That was one of the arguments you used as a basis
9595 of the conclusion of illegality of this agreement?

A. I didn't use it.

Q. It is in your signed statement: is that correct?

A. I don't know. Where is it?

Q. If you will observe page 7.

By the COURT:

Q. Incidentally, what happened to your claim, Dr. Reichel, for refund? Did you get it?

A. It was compromised as these claims usually are. I think we got about $500,000. But this is not unusual on these claims.

We had a claim in Viscose for $11,000,000 and I don't think I signed the papers, William Brown signed them, but I never sat in on a single conference. It is so technical and so complicated and so specialized that these cases are all handled by specialists.

Q. Tax specialists?

A. Tax specialists and a think like this comes to you and you know who has been handling the case. You look it over and read it over and sign it. Some officer of the company has to do that.

By Mr. MINICUS:

Q. When you sign such a statement, Dr. Reichel, do you feel that you had no responsibility for the statement you signed?

9596 A. No, I wouldn't say that. But when you know that men like William H. Brown and James B. Miller and people of that kind with reputation have prepared something of this kind, you don't check every comma and every word. You don't study it for days before you sign it.

9597 Q. Does that fact in any way relieve you of your responsibility?

A. No, I wouldn't say that it did.

Q. Do you think that that fact justifies you to come into court and state that you have no responsibility for this thing?

A. No, I wouldn't say that.

Q. Now, I ask you again, sir, was one of the grounds upon which this claim of illegality of the agreement was predicated, was one of those grounds the fact that the moistureproof agreement by means of the royalty provisions restricted the quantity of moistureproof cellophane which Sylvania could sell?

A. My answer was that theoretically it would appear to restrict it but as a practical matter it didn't.

Q. Did you ever refer to these restrictions upon Sylvania as a quota?

A. As a quota, no, not to my knowledge.

Q. Will you turn to page 7 of this report, sir, the last sentence, next to the last paragraph. Do you there refer to it as a quota?

A. The last sentence in the third paragraph?

Q. The second full paragraph from the top.

A. On page 6, you say?

Q. Page 7.

A. Oh, excuse me.

Q. The second full paragraph, the last sentence.

9598 A. The word "quota" is used there.

Q. The word "quota" is used there?

A. Yes.

Q. Do you believe that the statements in this report are true, Dr. Reichel?

A. Well, I would say substantially, otherwise I wouldn't have signed it.

Q. When you swore to it did you say that they were substantially true or did you say that they were true to the best of your knowledge and belief?

A. I don't recall—what did I say?

Q. Will you look at page 14, sir, where your affidavit appears.

The COURT. I have no copy of this.

Mr. MINICUS. I am sorry, but the Treasury Department only gave us three copies, one of which I had to give to defense counsel, the other of which the witness is using.

Mr. GESELL. Your Honor may use my copy.

The COURT. What page are you referring to?

Mr. MINICUS. Page 7 was the last one, the final sentence in the second full paragraph on page 7, where the witness has stated that the word "quota" is used.

The COURT. Where was that, Mr. Minicus? Where was that on the page?

Mr. MINICUS. The last sentence in the second full
9599 paragraph.

The COURT. Yes, I have it. Proceed.

Mr. MINICUS. Now I have asked the witness, does he consider the statements in this report to be true at the time that he signed the report.

The WITNESS. My answer was, I must have, to the best of my knowledge and belief.

By Mr. MINICUS:

Q. Did Sylvania at any time sell moistureproof cellophane in excess of the percentage which you have termed to be a quota?

A. I don't recall. We were close to it at one time for a short time.

Q. You have been on occasion very close to it, Doctor?

A. Once, I think.

Q. But to the best of your knowledge you haven't ever sold in excess of it?

A. Not to my knowledge, no.

Q. Have you any knowledge, sir, of a conference between Dr. Wallach and Mr. Hatt of the Dupont Company in November, 1935, when Dr. Wallach in checking how close Sylvania was to the permitted percentage remarked that it did not seem advisable to provide for further production when there was no possibility of selling it profitably?

A. No, I know of no such conference.

Q. Now, sir, you have stated, have you not, that a con-
9600 clusion was reached in 1935 in the Sylvania corporation to the effect that there were very serious doubts about the legality of these royalty provisions and their effect of restricting it, have you not stated that?

A. Not officially, no, there was no thought in Sylvania that that was the official attitude.

Q. Wasn't official action taken on that, sir?

A. No.

Q. Wasn't the omission from the prospectus of the sale of stock an action taken in reliance upon that conclusion?

A. I wouldn't know, but I don't think so. I had no part in that.

Q. Does not your statement here so state?

A. Maybe it does—I don't know—where do you find that?

Q. Second paragraph, page 9, midway through the second paragraph, "Accordingly Wallach advised—" let's move up a little, the second sentence in the second paragraph on page 9: "When Wallach conferred with counsel he was advised that in the opinion of counsel the restrictive covenants of the agreement were in viola-

tion of the anti-trust laws and therefore void and unenforceable. Accordingly Wallach advised the foreign stockholder and the banking group that the provisions of the Dupont agreement would not interfere with the continued progress of Sylvania and no mention of these restrictions was made in the prospectus which
9601 under the securities were offered to the public."

Mr. GESELL. Now, your Honor, that is exactly the kind of question to which I have had prior objection. The witness has repeatedly said he had no personal knowledge of this. What Mr. Minicus has now done is read into the record two sentences from an inadmissible document, and I move to strike it.

Mr. MINICUS. I state the document is not inadmissible. Even if we had offered it, it certainly would be admissible as past recollection recorded, and even if he has no present knowledge, I see no way in which I can possibly refresh his recollection until I refer him to it.

Mr. GESELL. It looks like he has the wrong witness. He has a man who knows nothing about it and he can't read that sort of thing in the record, and I wish to renew my objection to strike the question.

Mr. MINICUS. Your Honor, how can I have the wrong witness? This witness states that he has read this thing, he signed his signature at the end of it, then on the next page he executed an affidavit to the effect that he had read it and that the facts stated therein were true to the best of his knowledge and belief. If he isn't the man who can testify to the facts in here, I don't believe anybody possibly could. I can't have the wrong witness. If there is any witness on this document it must be the witness on the stand.
9602 The COURT. I think the execution of the instrument under oath gives a presumption of validity to the statements therein contained. Now if you want the opportunity to dissolve that presumption, it will be given to you, Mr. Gesell, but you may proceed, Mr. Minicus.

Mr. GESELL. I thought I had already done that in the voir dire, when the witness said he had no knowledge and never did have.

The COURT. What I was referring to by my latter statement was, you stated you wanted to argue at length the admissibility of these documents.

Mr. GESELL. I do.

The COURT. When is that going to occur, when they are offered?

Mr. GESELL. I would suppose so.

The COURT. I will hear you at length at that time.

Mr. MINICUS. These documents will be offered in rebuttal, your Honor.

The COURT. Very well. Proceed, Mr. Minicus.

By Mr. MINICUS:

Q. Now, sir, we were considering whether Sylvania ever took official action in reliance upon this conclusion reached in 1935 that the royalty provisions imposed an unlawful restriction upon Sylvania, and I asked you if that was an official act of the company.

9603 A. My answer was no.

Q. You mean it was not an official act of the company when Dr. Wallach caused the fact of these restrictions to be omitted from the prospectus?

A. That is a technical question. I wouldn't know the answer to that because I knew nothing about the situation. I don't know whether the bankers were told by Mr. Hills or just what the story was at that time.

What is ignored is, of course, that a statement of this kind isn't of my own dictation. This statement has been prepared by these various people, tax counsel, treasurer's office, tax experts, and these documents then are brought to some official of the company to sign.

Q. Isn't it your responsibility to take the responsibility when you sign such documents? Does it make any difference who did it as long as your signature is on it, sir?

Mr. GESELL. I object to that. Difference to whom about what, your Honor? That is a bullying question.

The COURT. I think that question is objectionable. Objection sustained.

By Mr. MINICUS:

Q. When you sign a document on behalf of the Sylvania Corporation or American Viscose Company, is that an official act, sir?

A. I would think so.

9604 Q. And because somebody else has prepared that document and you have just read it and signed it, does that make it any less your act than if you had dictated it yourself?

A. That is a legal question I wouldn't know.

Mr. GESELL. I object to that.

By Mr. MINICUS:

Q. It is a what?

A. That is a legal question.

Q. I didn't ask you if it was a legal question. I asked you is it your responsibility once you sign it?

A. I would say the answer to that was yes.

The COURT. Responsibility to whom?

Mr. MINICUS. To whomever the document is directed, your Honor. In this case the document is directed to the United States Government. Can this witness say, simply because somebody else —

dictated it and he signed it, that he has no responsibility to the United States Government for it?

The WITNESS. I didn't say that.

The COURT. He may have responsibility to the United States Government, but at the same time he has a right to give his explanation as to the circumstances surrounding the execution of the instrument, and that is what the witness wants to tell you.

Mr. MINICUS. I understand that, sir.

9605 The COURT. Now, the legal significance of the document is one thing. I will have to determine that ultimately. But the witness has the right to tell what are the facts and circumstances surrounding his execution of the document.

Mr. MINICUS. Pardon me a moment, sir.

The COURT. Certainly.

By Mr. MINICUS:

Q. Now, Dr. Reichel, was the conclusion reached in 1935, officially or unofficially within the Sylvania Corporation, that these royalty provisions restricted Sylvania's production and therefore were unlawful and unenforceable?

A. I don't know. I explained a little while ago, I don't know anything about this 1935 deal. I wasn't in on it at all. I had nothing whatsoever to do with it.

Q. You must have read about it.

A. I was at the plant at Fredericksburg, Virginia. Dr. Wallach and George Hills handled this whole thing.

Q. Then, sir, why in 1949 did you sign this statement and say it was correct and true to the best of your knowledge and belief?

A. Knowing who prepared this document, knowing the people who had prepared it, and having been with the company this long, I had no objection to signing it. In fact, I feel sure if you were to investigate all the facts; if you were to talk to Mr. George Hills, if Dr. Wallach were living and you were to talk to him, if

9606 you talked to Sidney Weinberg or Robert Lehman or the man at Hallgarten, I am sure they would say that this was correct; and I had no knowledge of it.

Q. You were an officer of the company at that time?

A. I was not a director or officer.

Q. What was your capacity?

A. I was an officer, excuse me, vice-president in charge of development production, but I wasn't a director until 1938, and I had my headquarters at Fredericksburg.

Q. Is this a true statement, sir, that after Dr. Wallach had conferred with his counsel in 1935 and had been informed by his counsel that these restrictions were in violation of the anti-trust laws that Dr. Wallach caused the fact of the restrictions to be omitted from the prospectus?

A. I wouldn't know that.

Q. Did you state in 1949 in a statement submitted to the Bureau of Internal Revenue that to the best of your knowledge and belief that was the true fact?

A. I don't know that. Does it so state here?

Q. Will you, sir, kindly refer to page 9, the entire second paragraph, the first full paragraph appearing on the page.

A. It so states here.

Q. Did representatives of the Sylvania Company go to the Dupont organization in 1935 and tell them that in their opinion the royalty provisions imposed an unlawful re-
9607 straint upon the Sylvania Corporation?

A. Not to my knowledge.

Q. Do you know whether that statement is in here?

A. No.

Mr. GESELL. Will you tell me where it is in there, Mr. Minicus? What page is it there? I don't have a copy.

Mr. MINICUS. I didn't ask the witness that. I will come to that in time.

Mr. GESELL. You have clearly intimated to the witness it was in there. Will you show me where it is? I don't have a copy.

Mr. MINICUS. I said, "Is that statement in here?"

The COURT. Well, is it?

Mr. MINICUS. Yes, it is. I intend to find it during the recess. I have mislaid it.

Mr. GESELL. Well, let's find it if we may now, your Honor. I don't have a copy, and I feel handicapped about it in the examination.

The COURT. Here is a working copy for you.

Mr. GESELL. Now what page is it?

Mr. MINICUS. This time the defendant has asked for a reading of the statement. On page 9, sir, the beginning of the first full paragraph on the page: "When Wallach consulted officials of Dupont he gained the impression that Dupont did not at-
9608 tach particular importance to the restrictive provisions of the agreement."

Mr. GESELL. That is entirely different than the question.

Mr. MINICUS. I see no difference.

The COURT. That would seem to indicate that Dupont thought the agreement was legal.

Mr. MINICUS. I say it indicates that Dupont thought the agreement was enforceable. Whether or not it was legal is a legal question to be decided.

The COURT. Well, at least that statement does not support the statement you made that Sylvania had gone to Dupont and had

remonstrated with them that the agreement was illegal. I don't gather that from the sentence you read.

Mr. MINICUS. It does show here——

The COURT. Pursue your examination. Our last point of departure was this: You asked the witness whether any official with authority had gone to Dupont and told them that he thought that the Dupont-Sylvania license agreement was illegal, and the witness' answer, as I recollect, was that he had no such knowledge, period. Now, let's go on.

By Mr. MINICUS:

Q. Dr. Reichel, was it the position of the Sylvania Corporation in 1935 then that the moistureproof agreement of April 26, 1933 was legal and enforceable against the Sylvania Corporation?

9609 A. I always considered it legal, but we had this opinion from George Hills in 1935 which I read this morning, which would indicate otherwise.

Q. Then you say that your opinion was it was legal and Mr. Hills' opinion was that it was illegal, is that your statement?

A. Yes.

Mr. GESELL. He didn't say that.

Mr. MINICUS. He just said "Yes" to it as I asked him.

Mr. GESELL. He said he considered the agreement legal. He didn't say it was his opinion. There isn't a man who can give an opinion on the legality——

Mr. MINICUS. I think that is playing with words, your Honor. I am not particularly sensitive about cross-examination but——

The COURT. Let me refresh my recollection as to what was stated here this morning.

By the COURT:

Q. When had you seen Mr. Hills' opinion for the first time?

A. This morning.

Mr. MINICUS. The statement, on the other hand, and the testimony discloses that there is a reference in here that Mr. Hills' affidavit was attached to this.

9610 The COURT. That is the last sentence in the second paragraph on page 7, I remember.

Mr. MINICUS. And it was not an opinion, your Honor. It was testimony offered by Mr. Hills in this claim and offered as an affidavit.

By Mr. MINICUS:

Q. To use Mr. Gesell's language, sir, your testimony then is that in 1935 you considered the agreement legal but Mr. Hills did not consider it legal?

A. No, I would say—my feeling was that in 1933 when this agreement was entered into it was considered a legal agreement.

Q. Then why did you sign this statement, sir, and submit it to the Bureau of Internal Revenue with this heading "Legality of the du Pont license agreement" and all of these facts under it that cast doubt upon the legality of that agreement, if you have always considered it legal?

A. I didn't say I always considered it legal. I said we considered it legal in 1933 when it was made.

Q. I am speaking about 1935 now, sir.

A. Well, this was signed when, 1949?

Q. Yes, sir, but it relates back to an event in 1935.

A. Well, I knew nothing about the event in 1935.

Q. Did you in 1949 state that it was true to the best of your knowledge and belief?

A. According to this statement, yes, I must have.

9611 Q. Now, you have stated that in 1933 the company considered this agreement to be a legal document?

Now, in 1949 you testified to the fact that there were serious doubts about the legality of the document in the company in 1935?

A. Apparently I signed a statement to that effect.

Q. And the statement also shows, does it not, that the company took some action with regard to that position, the omission of the fact in the prospectus?

A. I don't recall anything of that kind. It so states here, does it?

Q. Yes, sir. Now, do you recall, Dr. Reichel, that the agreement of October 26, 1933, was amended in the year 1938?

A. No, I don't recall. It was amended some time later. I don't recall 1938 or not.

Mr. GESELL. May I inquire what the agreement of October, 1933, is you are talking about so the witness knows?

Mr. MINICUS. I said August 26, 1933.

Mr. GESELL. No, you said October, 1933. The witness is confused. We don't know what the agreement is.

Mr. MINICUS. It is the agreement of April 26, 1933.

By Mr. MINICUS:

Q. Now, do you recall that that was amended in the year 1938?

A. No, I don't.

9642 Q. I show you Government Exhibit 2488 and ask you if that is an agreement amending the agreement of April 26, 1933.

A. No, I don't recall this amendment now.

Q. Were you an officer of the company at the time of that amendment?

A. Yes, I was.

Q. Were you a director of the company at the time of that amendment?

A. Yes.

Q. You have no recollection of it, sir?

A. I don't recall this, no. It is fourteen years ago.

Q. Now, Dr. Reichel, subsequent to 1935 did Sylvania continue to pay royalties for more than ten years which royalties amounted, according to your statement, to approximately $2,000,000?

A. Yes. I wouldn't want to be held to that figure, but I think it is approximately correct.

Q. So to that extent Sylvania did not consider the agreement unlawful?

A. No, that is right.

Q. You would not have paid royalties on an unlawful agreement, would you, Dr. Reichel?

A. I don't know. I think that if we were suddenly to have a situation where love is free we would stick to our wives. After all, we made this agreement in 1933.

9613 Q. You are testifying now that if you had come to the conclusion in 1935 that this agreement you would still have continued paying royalties under the agreement for a ten year period which royalties amounted to approximately $2,000,000?

A. I don't know.

Q. But you did pay such royalties, did you not?

A. We did pay royalties, that is right.

Q. Yet in 1949 you submitted over your signature to the Treasury Department a signed statement that cast serious doubt upon the legality of that agreement?

A. Yes.

Q. Subsequent to 1935 did Sylvania continue for many years to submit quarterly reports to du Pont showing its poundage of M. T. cellophane sold and the value of such poundage?

A. Yes, I am sure we did.

Q. I show you Government Exhibit 2593 and ask you is that one of such reports?

A. Yes.

Q. What is the date on that?

A. April 23, 1943.

Q. And these reports and reports of this nature were submitted quarterly until the termination of the agreement?

A. I think they were quarterly. I am not sure.

9614 Q. I show you Government Exhibit 2594, which was admitted in evidence with the report you just saw, and you if there is a statement there on this du Pont report, "per cent allowable under contract annual basis"?

A. Yes.

Q. What is the per cent allowable shown?

A. The per cent allowable is 25.4 and allowable under the contract is 29.

Q. Now, your statement appears on page 6043 of the transcript record of this trial to the effect that the permissible upper limits of Sylvania's moistureproof production under the royalty provisions were not problematical because Mr. Hatt always kept Sylvania informed of where it stood. Do you recall that statement?

A. Yes. I would like to see that because I don't know that it was always Mr. Hatt. Sometimes it was. After Mr. Hatt died it was Mr. Hines.

Q. The entire colloquy begins there with that question.

A. That is all right. I would say probably generally John Hatt, who was general manager of the sales division.

The COURT. We will take a ten minute recess.

(At this point a brief recess was taken.)

9615 By Mr. MINICUS:

Q. Now, Dr. Reichel, the problem we are working with is this: How could Sylvania have felt for the purposes of these extra royalties what its permissible production would be at the beginning of the year when the basis for figuring that production was not ascertainable until sometime early in the next year?

Mr. GESELL: Objection, your Honor. At the time that Dr. Reichel was dismissed from the stand we had a clear understanding that the examination would be confined to the representations his counsel made to the Treasury Department——

Mr. MINICUS. And it will be, your Honor.

Mr. GESELL. And it seems to me we are going afield of that.

Mr. MINICUS. I will tie it up in just a moment, sir.

The COURT. Well, what is your offer of proof? How are you going to tie it up?

Mr. MINICUS. Your Honor, this is cross-examination——

The COURT. I know, but it is a limited cross-examination by your own stipulation.

Mr. MINICUS. I intend to show a contradictory statement, your Honor.

The COURT. With respect to what?

Mr. MINICUS. Previous testimony of the witness. Of course it is going to be difficult now.

9616 The COURT. Would you read the question, please.

(The reporter read the last question as follows:)

"Question: Now, Dr. Reichel, the problem we are working with is this: How could Sylvania have felt for the purposes of these extra royalties what its permissible production would be at the

beginning of the year when the basis for figuring that production was not ascertainable until sometime early in the next year?

The COURT. Now, you connect that up, Mr. Minicus, with the testimony with relation to the claim for refund of taxes.

Mr. MINICUS. I am going to do that directly in the course of questioning.

The COURT. I want to know what relation this question has to the scope of your cross-examination.

Mr. MINICUS. The witness testified on direct examination, your Honor, that it was very easy for him to tell what their allowable production would be for the year because Mr. Hatt kept them informed and therefore they had a formula by which they could tell in advance just how much production could be turned out——

The COURT. I am going to allow you three more questions and then you move to strike, Mr. Gesell.

Mr. GESELL. That testimony, your Honor, was when he was last on the stand, not today.

9617 The COURT. We will have the question read again.

(The reporter read the question again as follows:)

"Question: Now, Dr. Reichel, the problem we are working with is this: How could Sylvania have felt for the purposes of these extra royalties that its permissible production would be at the beginning of the year when the basis for figuring that production was not ascertainable until sometime early in the next year?"

The WITNESS. Well, there was some lag—I don't know—for instance, take any quarter of the year; take the October, November, December quarter. Let us say that the middle of January or the 20th of January or even the end of January we knew how we stood for that quarter. Well, if we were two or three or four or five per cent under the permissible figure, there was obviously no possibility of catching up to the permissible figure during that short period, particularly when a whole year was involved. So there was just a question of a lag; it wasn't a question of a whole year; it was a question of maybe a lag of thirty or sixty days at any one time.

Mr. MINICUS. Is this my first question coming up, your Honor?

The COURT. Yes.

By Mr. MINICUS:

Q. Then Sylvania always possessed means by which it could ascertain in advance approximately what its permissible

9618 production could be?

A. I would say we knew where we stood.

Q. Is that statement not directly contradictory to a statement you proffered in your report to the Bureau of Internal Revenue?

A. I don't know.

Q. Pardon me, sir?

A. I don't know; I would have to check that.

Q. Will you turn to page 6, sir, the next to the last paragraph on the page, where it says, "It is only comparatively recently that Sylvania became authoritatively informed as to du Pont's moistureproof cellophane dollar sales during the prewar years."

A. Where is that now? Oh, yes, I see it. Excuse me.

Q. Now, sir, if you will turn to the bottom of page 7, it says there, "In order to compute accurately the extent to which Sylvania could have increased its moistureproof sales without exceeding the quota restriction imposed by Section 11 of the license agreement, assuming for argument that the restrictive provisions of the license agreement were legal and enforceable, a great deal of additional information would be required, including, (1) an interpretation of the license agreement, (2) possibly a breakdown of du Pont sales as to what deductions were taken into account, and (4) what

9619 sales of Sylvania and du Pont are to be taken into account in arriving at the total industry."

Let's relate that back to the statement on page 6 where it says, "It is only comparatively recently that Sylvania became authoritatively informed as to du Pont's moistureproof cellophane dollar sales during the pre-war years," and I ask you again, is that position given to the Bureau of Internal Revenue not directly contradictory to the testimony you gave this Court?

A. I would say it was not entirely in accord.

9620 Q. In what elements is it in accord at all?

A. It doesn't seem to check.

Q. Now, did Sylvania in 1935 conclude that the restrictive provisions of the du Pont license agreement were illegal and unenforceable under the anti-trust laws?

A. Never heard it mentioned. I don't know anything about that at all.

Q. Will you turn to page 8, the first paragraph after the heading "Legality of du Pont License Agreement"? Does it state there that, "prior to the base period it had been concluded by Sylvania that the restrictive provisions of the du Pont license agreement were illegal and unenforceable"?

A. Where is that page 8, you say?

Q. Page 8, the first paragraph after the heading "Legality of du Pont License Agreement."

A. As I said, I didn't know about that situation at that time.

Q. You didn't know about that situation?

A. No.

Q. But you did state in 1949 to the best of your knowledge and belief that statement was correct; is that right?

A. That is right.

Q. You have before you an amendment of the agreement of April 26, 1933, which was amended in 1938. Is there any reference in that amendment to the deletion of these restrictive
9621 provisions?

A. I don't know unless I read it through.

The COURT. Refresh my recollection, counsel.

Mr. MINICUS. Yes, sir.

The COURT. Were royalties paid by Sylvania to du Pont between 1935 and 1938?

Mr. MINICUS. Yes, sir, regular.

Mr. GESELL. And thereafter, your Honor.

The COURT. I wasn't particularly interested in royalties paid after the agreement was amended, but I was interested as to whether royalties were paid within the period 1935, wherein this tax refund claim was made and 1938. They were in fact paid.

Mr. GESELL. They were in fact paid.

The WITNESS. Do you want me to take time to read this?

The COURT. Sure, take your time, Mr. Witness.

Mr. GESELL. The witness testified he doesn't recall that agreement at all. He didn't delete those provisions. There is no dispute about it. They weren't deleted in the 1938 amendment. Mr. Minicus and I have no dispute about that.

Mr. MINICUS. We can move along in that case, your Honor.

The COURT. All right, proceed.

9622 By Mr. MINICUS:

Q. Was the second fact upon which Sylvania based its conclusion of illegality in 1935 that the terms of the moisture-proof agreement combined a cross-license with a restriction on either patentee's right to grant further licenses so that the mutual consent of the entire industry was a prerequisite for a license to third parties?

Mr. GESELL. From the beginning the witness said he has no knowledge, and gradually we are reading all these papers into the record. I think it is an improper way to examine a witness on a document whereon voir dire he said he has no recollection of it and knows nothing about it. I will object to it.

At the conclusion of this testimony I want to have a broad motion to strike which we can consider in connection with the proffer of these documents when they come in on the Government's rebuttal case.

The COURT. Very well.

Mr. MINICUS. I would like to say in answer to counsel's position that I have no reference to any papers. I simply asked, was the second facts upon which Sylvania based its conclusion of illegality in 1935 that the terms——

The COURT. The witness on two occasions answered that question by saying he never heard it discussed circa 1935.

Mr. MINICUS. But we have a sworn statement.

9623 The COURT. I thought you were not referring to the statement.

Mr. MINICUS. Not on that particular question, but can the witness possibly deny all he did when he says he read it in here three years ago and swore to the fact that he read it in there and to the best of his information and belief it is correct?

The COURT. I have got to try my legal conclusions as to what is found in the years that you have made reference to. But at the same time the witness has the right to explain the facts and circumstances surrounding the execution of that agreement and what he, in fact, knew in 1935. He states that in 1935 he had no recollection of these situations which you are making reference to.

Mr. MINICUS. But here in 1949, your Honor, before another Government agency——

The COURT. I understand that clearly. Let us have that question, Mr. Reporter.

(The following question was read by the reporter:)

"Question: Was the second fact upon which Sylvania based its conclusion of illegality in 1935 that the terms of the moisture-proof agreement combined a cross-license with a restriction on either patentee's right to grant further licenses so that the mutual consent of the entire industry was a pre-requisite for a license to third parties?"

9624 The COURT. Does this question relate to the year 1935 or 1949?

Mr. MINICUS. I would like to relate it first to 1935 and then to 1949.

The COURT. Proceed.

By Mr. MINICUS:

Q. Take that question in a reference framework of 1935, and what your answer be, Dr. Reichel?

The COURT. Why can't we try to make it simple, Mr. Minicus?

Mr. MINICUS. I will do anything I can to make it that way.

By the Court:

Q. Did you think in 1935 that the cross-licensing provisions in the license agreement was illegal?

A. I didn't think in 1935. I had no part in this in 1935.

Q. In 1949, when you executed Government Exhibit for Identification 2917, did you consider these cross-licensing provisions illegal?

A. I think at that time the general impression was that they probably were.

The COURT. All right, Mr. Minicus. Let us get along.

By Mr. MINICUS:

Q. In 1939 did the Sylvania Corporation execute an
9625 agreement with the du Pont Company whereby the Sylvania Corporation granted its consent to du Pont to license the Marathon Corporation under du Pont's moistureproof composition pact?

Mr. GESELL. That is beyond the restrictive scope of this cross examination by stipulation of counsel.

The COURT. Clearly so. Objection sustained.

Mr. MINICUS. The question, your Honor, is whether if they felt in 1933 that this was one of the grounds under which——

The COURT. I thought you made reference to the year 1939.

Mr. MINICUS. By subsequent witnesses ——

The COURT. That is post this application for refund which occurred in 1935.

Mr. MINICUS. The application for refund occurred in 1949, your Honor. 1935 was the omission of the restrictions from the prospectus to the sale of stockholders. This is 1949 we are talking about, only three years ago. It was the excess profits of the war period.

The COURT. You are right on that, but what relation does the question have to the tax situation?

Mr. MINICUS. My position is this: that one of the bases in which they claim to the tax department that its agreement was il-
9626 legal was these cross-licenses provisions requiring mutual consent. They have that in 1949 before the tax department. I may have to bring in witnesses to show that there was a definite conclusion in the company in 1935 although this stock, such as it was illegal then—I am trying to show that with that knowledge of illegality in 1935, in 1939 they still acted pursuant to it by giving du Pont consent to license the Marathon Corporation under one of du Pont's licenses.

The COURT. Proceed.

By Mr. MINICUS:

Q. Was such an agreement executed between du Pont and Sylvania in 1939?

A. I believe there was. I am not sure. I had no part in it but I believe there was.

Q. Do you know whether as a result of that agreement du Pont and Sylvania split the royalties received from Marathon in a percentage of two-third to one-third?

A. I don't remember how that was.

Q. Was a third fact upon which Sylvania based its conclusion of illegality in 1949, that the terms of the moistureproof agreement

required both parties, both parties representing the entire industry, each to give the other an opportunity to acquire an exclusive license on any future patents in the field of moistureproof cellophane?

A. May I have that question again?

Q. It has reference to the future licenses, the agreement
9627 by each party to grant exclusive licenses under any future patents which may mature in the future.

Mr. GESELL. There wasn't such an agreement in effect in 1949. I don't understand the question.

The COURT. There can be no dispute about that. Was there an agreement?

Mr. MINICUS. Of course there was an agreement, but they were arguing in 1949 that the agreement terminated in 1949 was illegal on this ground.

Mr. GESELL. You are asking him questions as to 1949.

Mr. MINICUS. That was the position they took in 1949.

The COURT. It is simply a problem of clarification.

Mr. MINICUS. Yes, sir. In 1949 they went to the Treasury Department and stated that this agreement was illegal. I asked the witness two questions so far: was one of the bases for this conclusion that the agreement was illegal, the restrictions on the production; and second, was the cross-licensing, and now I am asking him with reference to granting exclusive licenses under any future patents which might mature in the future.

The WITNESS. I think Mr. Hill so stated in his affidavit something to that effect.

9628 By Mr. MINICUS:

Q. Subsequent to 1935, however, did Sylvania and du Pont continue to exchange exclusive licenses under future patents as they matured?

A. I don't recall.

Q. You don't recall whether Sylvania acquired any licenses on moistureproof cellophane from du Pont after 1935?

A. No, I don't recall.

Q. Do you recall whether Sylvania licensed du Pont to exclusively practice under Sylvania's patents after 1935?

A. No. We may have and they may have licensed us, but I don't recall.

Q. Did you acquire any patents yourself personally after 1935, Dr. Reichel?

A. I presume I did.

Q. Do you know whether any of your patents were licensed to the du Pont Company?

A. No.

Q. Now, Mr. Reichel, with reference to this statement of yours, which is Government Exhibit 2017 for Identification, did you have any knowledge of the facts recited in this statement when you signed it in 1949?

A. Which is that?

Q. This is your statement signed by you. That is exhibit 2017.

9629 A. You mean this statement by tax counsel?

Q. This statement you signed here. That is the correct one, sir. Did you have any actual knowledge of the facts recited in this statement when you signed it?

A. Where? Which statement?

Q. All the statements in here.

A. Of course, I had some knowledge naturally.

9630 Q. Are there any statements in here that you had no knowledge of at the time you signed it?

A. My knowledge to a great extent rested in my confidence in the people who had prepared the statement. I had to—I mean, you can't know all these details; it is impossible.

Q. Who prepared this statement, Dr. Reichel?

A. Either W. H. Brown or James D. Miller.

Q. Was James D. Miller an employee, an officer or a director of the Sylvania Corporation?

A. James D. Miller was an outside tax consultant with offices in New York.

Q. As an outside tax counsel for the corporation did he have greater knowledge of the affairs of the corporation than you had, sir, as president of it?

A. Perhaps not, but I would say W. H. Brown had. After all, I am a chemist by profession, not a lawyer or accountant.

Q. Are you able to testify, sir, that all of these facts in this statement originated with W. H. Brown?

A. No—I would say they all originated with Brown, with Toussaint, with James D. Miller, and the staff that worked on this thing.

Q. And you adopted them as your statements when you signed them?

A. I signed them thinking they were all right.

Q. And to the best of your knowledge and belief these 9631 statements today truly and accurately reflect the situation on this subject matter in the Sylvania Corporation?

A. I would say that under the same circumstances if we go back to '49, I would have signed this statement.

Q. Are the statements in here, sir, true?

A. Well, you asked me that before.

Q. I don't think I got a definite answer from you, Dr. Reichel.

A. I think in the light of the circumstances they are substantially correct.

The COURT. Mr. Minicus, what was that third ground of illegality?

Mr. MINICUS. The exclusive licensing of future patents.

No further questions, your Honor.

Redirect examination by Mr. GESELL:

Q. There are a large number of matters in this paper that you have just been referring to that you signed, are there not, Dr. Reichel, as to which you have no personal knowledge whatsoever?

A. There are, that is right.

Q. And that is true as to this whole matter of legality that we have been discussing this morning?

A. It is out of my province.

9632 Q. You are not a lawyer?

A. No.

Q. Did you attend these various conferences with the representatives of the Bureau of Internal Revenue relating to this claim?

A. I attended no conferences, and so far as I recall I attended no internal conferences on this subject.

Q. Internal conferences within the company?

A. That is what I mean.

Q. Did you or anybody else in Sylvania to your knowledge ever at any time communicate to anyone in du Pont that there was a belief by anyone in Sylvania that this agreement was illegal in any respect?

A. Not to my knowledge.

Mr. GESELL. That is all.

Now, may I have a question to Mr. Minicus through the Court?

The COURT. Certainly.

Mr. GESELL. Are the documents that have been introduced for identification here from the files of the plaintiff, do they represent all of the papers filed by this company in its 722 tax claim that we have been discussing or only a selected portion?

Mr. MINICUS. It is not a selected portion. On the other

9633 hand, your Honor, I understand that these do not represent all of the documents that are in the files of the Department. It is my understanding that they represent all of the documents that are pertinent to the matter we have under discussion here. No documents, I assure the Court, have been purposely deleted. We ourselves have not seen the complete file because we have only seen the files in Washington. There are files, we understand, in Richmond that go to other matters or the case that we are not concerned with here. But this particular problem of the legality of the agreement was raised in the Washington office at headquarters and therefore we are told that all of the documents on that

particular issue are in Washington and they are the documents that have been introduced for identification this morning.

Mr. GESELL. And all of the documents relating to capacity which has been the subject matter of most of the discussions?

Mr. MINICUS. These, sir, are all of the affidavits that were submitted by the Sylvania division in regard to this matter; that is all we have. We don't know what internal affairs the Internal Revenue Bureau has; they have been down in their field offices in Richmond, but we have submitted all of the documents that have come into our custody in regard to the issue proposed this morning. We have no further information on it, your Honor.

Mr. GESELL. Of course, I wasn't interested in what
9634 had come into his custody; I was interested in what the United States Government had relating to this matter that hasn't been brought forward here.

Mr. MINICUS. I have told the Court that there is nothing.

The COURT. I understand.

Did you make a selection of the documents or did you just ask for documents relating to this particular matter?

Mr. MINICUS. Mr. Fitzpatrick asked for the documents relating to this particular matter and they were turned over to us. We made no selection, your Honor.

The COURT. Very well.

You are excused, Dr. Reichel.

Mr. GESELL. I want to make clear the ground of my motion with respect to this testimony, your Honor, for the record at this time.

I move to strike all of Dr. Reichel's testimony on this cross-examination relating to the question of the reasons or nature of the opinion given by his counsel concerning the legality of the du Pont-Sylvania moistureproof agreement.

My motion is based on three grounds: There is no evidence that this was ever communicated to du Pont; in fact, the evidence is to the contrary. Therefore the evidence is hearsay and incompetent as to du Pont and not admissible against du Pont.

9635 Second, the evidence relates to matters of opinion which are within the province of the Court to determine, and under the decisions in the Third Circuit in the Weirton and other cases, such evidence is inadmissible, even where the statements are made by an alleged co-conspirator.

Third, this testimony is not pertinent to this case and admissible against du Pont, the only defendant on trial here, for these statements are not shown to have been acts or declarations of any co-conspirator. They are not shown to have furthered the objects of any conspiracy, nor are they shown within the Vehicular Parking ruling of your Honor to have related to the purposes of the conspiracy. So they are hearsay, immaterial, incompetent,

opinion evidence, inadmissible on all those grounds, and of course their relevancy has not been shown.

The COURT. Well, if it would give you any comfort, there is another reason, that before you can admit the admission of a conspirator you must first prove the corpus delicti, that there was in fact a conspiracy. So why don't you add that to your reasons?

Mr. GESELL. I have an additional——

The COURT. I want to hear both parties at length.

Mr. GESELL. I was directing myself to this testimony. There are several other grounds, no showing, for example,
9635 that, Mr. Hills was making a statement on behalf of the corporation when he gave the opinion.

The COURT. I think you have put your position on the record, but I will have full argument at the time you make your proffer, Mr. Minicus.

It is rather late to start a new witness, don't you think?

Mr. GESELL. Yes.

The COURT. We will recess until two o'clock.

(At this point a recess was taken until two o'clock p. m., the same day.)

9637 2:00 O'CLOCK P. M. THE SAME DAY.

Present: As before noted.

Mr. MINICUS. If your Honor please, after the conclusion of this morning's session Mr. Gesell made the suggestion that my statement relative to the manner in which the Government acquired these documents under discussion required correction. The Government does not feel that any correction is necessary. However, to avoid any possibility of future confusion of just what our position with regard to this matter was, I would like an opportunity to explain what happened in Washington.

Of course, the entire cross examination was addressed primarily, not exclusively, but primarily to the witness's statement concerning Sylvania's attitude with regard to the agreement, its legality or illegality, and nothing else.

Mr. Fitzpatrick, associated with me in the case, did the examination of this. However, I will not try to pass the burden to him. I take responsibility for this statement in its entirety.

In Washington, at the headquarters of the Bureau of Internal Revenue, we found out that the major file in
9638 this case, the file of the claim, was in Richmond. However, certain papers, copies of certain papers in the major file had been retained in the Washington office.

Now, we didn't go to Richmond to examine the file. We have no knowledge of what is in the Richmond file. We did examine the file that was retained in Washington which is not the complete file of the hearing. The document itself discloses that there was

a hearing on June 9 and subsequent to the hearing certain affidavits were requested to support the position at the hearing.

In Washington Mr. Fitzpatrick received a file that was about one inch thick and from that file he took Dr. Reichel's statement and the affidavits of Mr. Replogle, Hills and Stiner. It is noteworthy that those three affidavits, Replogle's, Hills', and Stiner's, are the only affidavits recited in Dr. Reichel's report.

Now, he tells me that there remained in that file after those affidavits were extracted certain letters from Sylvania to the Bureau of Internal Revenue. To the best of his recollection these letters were almost entirely of a forwarding character. They were simply formal letters saying, attached herewith is the affidavit and so on. There was also the decision of the Bureau on this matter in that file and nothing else that he had observed.

Now, of the documents examined by the Government in
9639 Washington none were excluded dealing with the subject matter of the cross examination this morning. Whatever we found on this question of Sylvania's conclusion that the agreement was illegal has been presented to this court and we saw nothing else in Washington in connection with that.

Mr. Gesell has seen copies of everything the Government has seen on this matter on the particular point in issue and has had an opportunity to question the witnesses on redirect examination to the full extent of the documents. If counsel for the defense has knowledge of any other documents pertinent to Sylvania's conclusion of the illegality of the moistureproof agreement he is at liberty to produce them.

We have no knowledge of such documents and don't believe that any exist which contradict the position that Sylvania considered the relationships unlawful. Thank you, sir.

Mr. McGLOTHLIN. I call Mr. Schnier.

ISADORE FRANK SCHNIER, called as a witness for the defendant, being first duly sworn, testified as follows:

Mr. McGLOTHLIN. Your Honor, I will make a brief statement as to why Mr. Schnier is here.

He is the founder and the principal executive of I. Schnier Company, which is du Pont's West Coast distributor for cellulose bands. He will testify as to the relations between his company and du Pont, why he has not engaged in the

* * * * * * *

9640 Q. Let me ask you this: Did you in fact ever want to manufacture bands?

A. No, sir.

Mr. McGLOTHLIN. That is all, your Honor.

The COURT. You are excused.

Mr. GESELL. Your Honor, that is all we have for today. We have run through our witnesses. We are on schedule. Both of the coming witnesses are from out of town and neither of them is here. They will be here tomorrow.

The COURT. Off the record.

(Discussion off the record.)

The COURT. Adjourn court until tomorrow morning at ten o'clock.

(At this point the trial was adjourned until Thursday, April 24, 1952, at 10:00 a. m.)

9641 THURSDAY, APRIL 24, 1952, 10:00 O'CLOCK, A. M.

Present: As before noted.

Mr. McGLOTHLIN. We call Mr. Leinbach.

FREDERICK S. LEINBACH, called as a witness on behalf of the defendant, was duly sworn and testified as follows:

Mr. McGLOTHLIN. If the Court please, Mr. Leinbach is here by subpoena. You may recall that in connection with the depositions we said we would bring in examples of the type of deposition we were taking. We have taken the deposition of Rhinelander Paper Company, one of the major glassine manufacturers in the United States.

Mr. Leinbach is an executive of the Riegel Paper Corporation, also a major producer of glassine paper. He will testify to the competition between the products of his company and other flexible products including cellophane; the characteristics and advantages of his company's products, how their price, quality and supply is interrelated with that of cellophane and periods of shortage of this material and of other manufacturing materials.

Direct examination by Mr. McGLOTHLIN:

Q. Will you state your full name for the record?

9642 A. Frederick S. Leinbach.

Q. What is your position with Riegel Paper Company?

A. I am Secretary of the corporation and Assistant General Sales Manager.

Q. As Assistant General Sales Manager what are your duties?

A. My duties are to supervise the activities of the salesmen in all our divisions under the supervision of my immediate superior, the Vice President in charge of sales and the other superior officials of the company.

Q. To what extent does your position give you an opportunity to know the uses to which your papers go and the competition they meet?

A. I feel I have an excellent opportunity to see all of those uses.

Q. Where were you educated?

A. Lafayette College, Easton, Pennsylvania.

Q. What degree?

A. Bachelor of Science and Chemical Engineering.

Q. When did you join Riegel?

A. 1934.

Q. Will you tell us in general the course of your work in Riegel or prior to your present position?

A. I worked for a number of years as a development engineer doing sales engineering work and developmental work in the field. I was with the War Production Board during 1942
9643 and 1943 as Assistant Director of the Containers Division of that group. I went back to Riegel, was loaned to the Government, returned to Riegel and did work on process development plant design, product development and then was moved into the Sales Department into my present position.

9644 Q. Do you have any connection with an association known as the Packaging Institute?

A. Yes, sir.

Q. What is your connection?

A. I am a vice-president of the Packaging Institute, a director of it, and general chairman of its technical committees.

Q. Will you tell us what the Packaging Institute is?

A. It is a non-profit organization interested in the technical and operational aspects of packaging largely. We have, oh, I should say, about twenty-five technical committees, as we call them, that are concerned with packaging operations, with the methods for testing the qualities of packaging materials. Our membership comprises people who actually package, the big food companies, a lot of people like that, that is, the package users. We have also the suppliers of packaging materials, and we have the makers of packaging machinery. They have a community interest in the whole program of packaging.

Q. Are glassine and greaseproof manufacturers members of the Packaging Institute?

A. Yes, sir.

Q. Are cellophane manufacturers also members?

A. Oh, yes.

Q. What are Riegel's packaging products?

A. Stating it very broadly, sir, we make glassine, we make greaseproof, we wax those products or lacquer them or
9645 laminate them; we print them, any combination thereof, of course; we make bleached kraft papers for certain bag uses such as flour bags and bags in self-service markets, and so on. We make papers for waxing and also waxed papers themselves.

By the COURT:

Q. Where is your plant?

A. The plants are in New Jersey along the Delaware River; Milford, New Jersey, is the main plant. The others are in a vicinity of about five miles thereof. We operate a pulp mill near Wilmington, North Carolina.

By Mr. McGLOTHLIN:

Q. How many companies produce glassine in the United States, Mr. Leinbach?

A. Eight.

Q. How would you say your company ranks among those eight?

A. We may be the largest, sir. We are certainly one of the two largest. Rhinelander is the other.

Mr. McGLOTHLIN. As an aside, your Honor, Rhinelander is the company of which the deposition has already been taken.

By Mr. McGLOTHLIN:

Q. How many mills does Riegel have?

A. Four paper mills.

Q. How many paper machines?

9646 A. Fourteen paper machines altogether.

Q. I believe you also said you did convert in the sense of printing.

A. Printing or waxing, lacquering, laminating. We do not actually make packages. We sell our packages in the sheet or web form.

Mr. McGLOTHLIN. Will you mark this as Defendant's Exhibit 1005 for identification.

(Brochure of the Riegel Paper Company was marked "Defendant's Exhibit No. 1005 for identification.")

By Mr McGLOTHLIN:

Q. I show you a brochure, Mr. Leinbach, which has been marked Defendant's Exhibit for identification 1005 and ask if that is a document put out by your company?

A. It is, sir.

Q. Now, turning to the center fold I see there are listed twenty-one popular Riegel papers with packaging data, is that correct?

A. Yes, sir.

Q. In the furthest right column a few general uses?

A. Yes, sir.

Q. Are all those actually uses that exist today?

A. Yes, they are, sir.

Q. Is that a complete and exhaustive statement of the uses of your paper?

9647 A. No, sir, it is not. They are typical uses, or illustrative uses, whatever you want to say.

Q. Now, in the column next to that there is a statement "other qualities". Are those correct statements of the qualities of your papers?

A. Well, they are, but they are not complete statements in each case. In other words, our people have picked out certain particular qualities that are of interest to certain particular uses, but these are not the entire range of quality of each one of these products.

Q. I notice in the statement of qualities, Mr. Leinbach, under paper No. 2, Riegeline, and under paper No. 15, Transolite, the statement "low cost transparency is one of the qualities."

A. Yes, sir.

Q. Will you take this document and explain what you mean by low cost transparency with respect to those papers? I believe there are samples of them on the inside.

A. All right, sir. No. 2 is Riegeline. It is the second sample down on the left inside, and it is a glassine that is made for better than average glassine transparency. If you put your hand under it or if you hold it over the printing, you can see that the printing is quite easily legible, which to us means transparency, and the cost of using this material is lower than the cost of using many other packaging materials with which it competes, and we think
9648 that adds up to low cost transparency, sir. The same is true of Sample No. 15——

Q. Will you go on with Transolite?

A. No. 15 is Transolite, as you see, the fifth sample down on the right, which again exhibits, we think, a very good degree of transparency, and it is quite an economical sheet to use compared to a good many competitive materials. Therefore we think that is a requirement for low cost transparency.

Q. Is Transolite a glassine?

A. No, sir, it is not.

Q. It is a sulphite paper?

A. Yes, its fibers are not hydrated as glassine fibers would be hydrated.

Q. Mr. Leinbach, I want to show you a document which has previously been marked Plaintiff's Exhibit Nelson No. 1 in the deposition of Robert Nelson. It is entitled, "Glassine and greaseproof, the wonder papers for protective packaging." Are you familiar with that brochure?

A. I have seen it, Mr. McGlothlin.

Q. Is it a publication of the Glassine and Greaseproof Association?

A. Yes, it is. I can testify to that.

9649 Q. I want to read you a statement in it and ask you whether that statement is true:

"The manner in which fibers are hydrated to make glassine makes it the most transparent of all papers. Not perhaps as transparent as some films—but offering the greatest degree of transparency per unit of cost of all packaging materials. All that is usually needed and at a cost which saves you plenty. It must be recognized that transparency is often a packaging liability. Sometimes it is best that a product be hidden or that harmful light rays be kept away. Often it is better that package design and color be seen than the product itself. Glassine is available in bright snowwhite grades. Thus whitness is an inherent part of the sheet—eliminating white background printing."

Do you agree with that statement?

A. Yes, sir.

Q. How many different types of paper does Riegel produce under the general term glassine?

A. We make approximately thirty different general types of glassine and we are able to and quite willing to and do vary each of those, some of them with as many as ten variations with one kind or another.

Q. What is the minimum order on which Riegel will make a variation of a type?

A. That varies with the competition of business. Ordinarily we would like to have twenty tons of any one kind.

9650 When business isn't too good we will work less.

Q. Is twenty tons considered a large order in your business?

A. No.

Q. To what extent does Riegel produce papers to meet the exact specifications of its customers?

A. That is more the rule than the exception with us. We will go to considerable trouble to work with the customer to find out his exact requirements and to try to tailor our product to meet those requirements. It is a fair statement that more than 95 per cent. of our glassine production is that against orders that have one or another of the various specific requirements which will differ in some way from a companion order following that.

Q. Will you tell us of qualities of paper they change?

A. There will be differences in the required amount of greaseproofness or transparency; there will be differences in the required amount of water vapor transmission resistance, of strength and sometimes of finish, just about every quality that you ascribe to the papers will be varied according to the use required.

Q. Would you say that the variations between your types are substantial or moderate?

A. They are substantial, from one extreme to the other.

Q. Have you any judgment as to the extent to which the development of a variety of types of glassine has been
9651 stimulated by cellophane?

A. Cellophane certainly stimulated us a lot.

By the COURT:

Q. Did you ever serve the same customers that Dupont serves?

A. Yes, sir, we have a number of customers like that, sometimes on the same product.

Q. Would you elaborate on that?

Mr. MCGLOTHLIN. I intend to come to that with the exampies.

The COURT. I am sorry.

By Mr. MCGLOTHLIN:

Q. Can you give us any example of a specific sheet that you believe was stimulated by cellophane?

A. We do a good bit of lacquering of glassine. We have had to work out a combination particularly for the tobacco industry of this Riegeline made as transparent as we can make it and lacquering for a suitable water vapor transmission resistance, gloss, sealability and the operable characteristics that are required to have us compete for that type of packaging. We term it diafane, derived from the word diaphanous and we have made it for a good many years. There is no question in my mind but what that particular grade was stimulated by the advent of cellophane.

Q. When you succeeded in the development of that grade
9652 were you then able to take business from cellophane?

A. We certainly both fought for the same business and we feel we took the chewing tobacco business away from them. I know of some instances where packagers which used cellophane came to our material and I must admit the converse, too.

Q. Have you any judgment as to any development by glassine that stimulated development in cellophane?

A. I can't testify to what stimulated those folks when they did some of this work. Prior to the war we worked pliolite coatings and we were able to attain an excellent moistureproofness both flat and on the creases. Subsequently we have seen offered for similar uses a cellophane of much increased moistureproofness.

Q. Do you find that the qualities of your papers and the qualities of cellophane are factors which you must consider in selling your products?

A. Yes.

Q. Does moistureproof cellophane ever take any business away from Riegel?

A. Yes.

Q. Do you take business away from moistureproof cellophane?

A. Yes, sir.

Q. Would you tell us how the competition between the two products is operated on chewing gum?

9653 A. The chewing gum package seems to be swinging over to a completely opaque material, be it foil or reverse printed cellophane. We now are selling to one of the large chewing gum manufacturers a paper made by ourselves, printed and overcoated with a high gloss producing what to all appearances on the store shelf would be the same package. This is true in one particular chewing gum plant. We have another one that is coming along well. I will show you those later. We feel we have a good chance to get a paper combination into that field in competition with what has become a traditionally cellophane package at this point.

Q. Do your products compete with aluminum foil?

A. Yes, sir.

Q. Has that competition stimulated the development of any glassine types?

Mr. MINICUS. Objection. I can't see the relevancy of competition between aluminum foil and glassine to this case. The question, if any, is whether there is any competition between glassine and cellophane.

We are not charging a monopoly of the packaging industry. I made that clear.

Mr. MCGLOTHLIN. Our position is that all these materials compete and this is an example of how it competes not only with cellophane but with other materials on exactly the same basis.

9654 The COURT. According to your theory of the case, I think the question is proper. The objection is overruled.

Mr. MCGLOTHLIN. Will you read the last question?

(The last question was read by the Reporter.)

A. Yes, sir, it has. We have had to work hard to develop materials with good moistureproofness and particularly that deadness of fold which is characteristic of foil, the ability to be crushed and not spring back. We can do that with lamination and through lamination we have had to approach that quality. Again the chewing gum package is an example.

Q. Do your products compete with vegetable parchments?

A. Yes, sir.

Q. Has that competition stimulated any technical improvements of your product?

A. That stimulated our development of wet paper glassines and greaseproof.

Q. To what extent is the package output of your company sold for pre-packaging to consumer units as opposed to bulk packages?

A. I should say that almost all of it. Whether it be 95 per cent. or 98 per cent., but almost all of it is used to put up a package which the consumer buys as a unit.

Q. Is most of that in the food industries?

A. Very heavily in the food industries, yes.

9655 Q. Do you sell your products in sheet form or roll form primarily?

A. Primarily in roll form.

Q. Why is that?

A. Well, the tremendous increase of automatic equipment for packaging or for the forming of packages naturally has led to the use of continuous rolls rather than the awkwardness of handling sheets. Sheets are not always but are more often characteristic of hand operation. The automatic operations usually require a continuous web.

Q. Has your company done any work with machine manufacturers?

A. We concentrate on that a great deal. We find that one of the best means of sales and development because if we can work with those engineers at the time they are designing a machine we can get them to design into that machine the qualities which are optimum for our materials as well as for other materials as far as that goes.

There also, of course, is the tie-in of the fact that in order to sell the machine, the man has to have the widest possible variety of materials that will run on it to give his ultimate customer the widest choice he can make of whatever package he wants to put up on that. It is a very important thing with us.

Q. You told us that you took business from cellophane
9656 and cellophane sometimes takes business from you. When a man is in cellophane and decides to take your product, how long does it take him to change?

A. Well, usually not long at all sir. It is a matter of what he wants to use tomorrow, or something like that. Most packaging equipment will handle either one of them. Many suppliers, bag suppliers, for instance, can ship the man cellophane bags or foil bags or glassine bags. It is just a matter of his inventory, and it is usually when he wants to change.

Q. Would the same answer apply to a shift from your product to cellophane?

A. Oh, yes.

Q. I want to ask you about a number of different characteristics and have you tell me how the glassine types available compare with cellophane as to those characteristics in your judgment. First, the specialization of type for particular applications. How does glassine compare with cellophane on that basis?

A. Well, I can't profess to be a cellophane expert, sir, but we think that we go much farther afield in specializing to particular

uses. We think we can do that because our process adapts itself to it.

In the refining of fiber you can stop that refining at the point where you will attain the quality your customer needs. We don't have to go all the way through a solution proc-
9657 ess, or something like that. We can go ahead and then make the paper. And we try to capitalize on that in selling our product. We try to engineer the thing to give the man what he needs at the most economical cost.

Q. Well, now, let's take cost. How do glassine compare with cellophane as to cost?

A. Well, we have been using the term "glassine" here this morning as though it were pretty much one single thing. Actually, glassine is a paper. It has greaseproofness, it has transparency, it does not have heat sealing, it does not have moisture-proofness; for instance, it will retain flavors and aromas or exclude them, as will many other things, of course.

Now, in order to give that product moistureproofness it must be waxed or it must be laminated or it must be lacquered. That adds to the cost very substantially. The glassine itself is on a per thousand square inch or yield basis, is considerably less expensive than cellophane whether the cellophane is plain or coated. Waxed glassine, I would say, varies—

Mr. MINICUS. Objection to this line of answer, your Honor. The gentleman is doing with cellophane exactly what he objects to with glassine. He is separating into different categories the various types of glassine and comparing them against an abstract cellophane rather than comparing his particular types of glassine with the particular types of cellophane.

9658 Mr. MCGLOTHLIN. I will restrict my question to moisture-proof cellophane.

The COURT. Very well.

The WITNESS. All right. Waxed glassine would be moisture-proof and is in competition with moistureproof cellophane.

By Mr. MCGLOTHLIN:

Q. How does it compare in cost?

A. It runs from twenty to fifty per cent less, I would say, in that order, per thousand packages.

Q. That is waxed glassine?

A. Yes. Laminated glassine, of course, is heavier; its yield is lower. It approaches more closely the per thousand square inch cost of cellophane. Lacquered glassine with nitrocellulose lacquers are now running about ten per cent under on a per thousand square inch basis. If we go over to cyclized rubbers, vinylite, and some of these other coatings, we have several that are more expensive and sell them.

Q. How can you sell glassine at a cost higher than the moistureproof cellophane?

A. We have to do some particular job that the man doesn't feel he can get, the customer doesn't feel he can get from an existing cellophane type.

Q. Now, the next quality I wanted to ask you about was operation on machinery, such as printing or bag making
9659 machinery; compare glassine with moistureproof cellophane.

A. If you were to print the nitrocellulose coating with glassine, it would not print any more easily than the moistureproof cellophane. That, however, is not the way it is done, and I must point out that we print the glassine first, then lacquer over it. Printing the paper surface first is much easier than printing a lacquer surface. We therefore can print faster and more easily.

In the case of waxed glassine the paper must be printed first because you can't print on wax, and therefore we print first and wax over it. Again, printing the paper first is cheaper and faster and the wax operation is just waxing.

Q. How about bag making machinery?

A. On bag making equipment glassine and the related glassines I would say without exception run a great deal faster than the moistureproof cellophanes.

Q. Now, let's turn to the quality of moistureproofness. Do you have glassines that equal or exceed cellophane in moistureproofness?

A. Nitrocellulose coatings on glassines properly formulated should be substantially in the same range, I mean, it should be in the same range, of water vapor transmission rates as the nitrocellulose coated, I think they call it 300 MST in du Pont and I have forgotten the Sylvania designation, but it is the nitrocellu-
9660 lose coated cellophane. The two coatings are generically very similar and perform about identically.

In the case of other materials, certain polymers or rubber derivatives we can develop a superior moistureproofness.

Q. How about greaseproofness?

A. There again we take advantage of our ability to tailormake. Cellophane has excellent greaseproofness and I wouldn't say that we surpass that at all. But we certainly can put into our sheet an adequate degree of greaseproofness for all but a very few uses, and I don't know of any of those uses, incidentally using cellophane.

Q. How about rancidity resistance?

A. Well, we feel we have got a very great advantage there, sir, because we have and market papers which absorb up to, oh, say, 90 per cent or even more of the ultraviolet end of the spectrum, that

is, in some cases, it will take out the blue and the violet and substantially all of the ultraviolet and keep out these harmful light rays. The lack of complete transparency in those particular cases where it is made to not be completely transparent is quite an advantage, we feel, in protecting it from the sun's rays and the harmful rancidity producing light.

Q. How about wet strength, comparing glassine and moistureproof cellophane?

A. Well, I have not taken any precise measurements on
9661 that, sir, but they both have wet strength.

Q. How about ability to be laminated?

A. I think it is much easier to laminate glassines than it is to laminate moistureproof cellophane. I think a great deal more of it is done, incidentally, in the glassine.

Q. Mr. Leinbach, what do you understand by the term "eye appeal"?

A. It is just that that attracts the eye, sir.

Q. In selling its products, what point, if any, does Reigel make of eye appeal?

A. We make a great deal of point. Breaking the thing apart, the things that attract the eye, of course, are color, pleasing appearance, or brilliance, gloss, anything that is visibly attractive, and in our particular case we like to think that brilliant printing—we know that brilliant printing, good printing on an opaque background, gloss, nicely formed, well shaped, well designed package, certain sizes and shapes attract more than other sizes and shapes. All that sort of thing goes into it and we feel we have got something very definite to contribute in any one of those things.

Q. What do you understand by the term "impulse buying"?

A. Well, to me, sir, impulse buying is the act of buying something in a store that you didn't come in to buy. You buy it while you are there; you see it, and without having gone there to buy it you just simply buy it on the spur of the moment.

9662 Q. In your judgment what factors stimulate the impulse buying?

A. Well, there are a great many, sir. They are quite complex, I would say. One that is very obvious is the position of the product in the store, the way it is displayed. Then also there is the printed display that goes with it. Certainly the appearance and the eye appeal of the package itself, the mood of the customer, whether he is buying this thing just before lunch and the soup looks good—a lot of things like that go into it, and I think it is a very complex thing. I don't think it swings on any single factor.

Q. Do you think the packages using your papers contribute to impulse buying?

A. We know they do, sir.

Q. Have you recently gotten samples of packages in the open market, Mr. Leinbach?

A. Yes, sir. I went shopping this morning and made a collection at the A & P market and the Food Fair market down the street.

Q. Now, would you, using those packages, show us how materials compete, including your materials and other materials.

A. Yes, sir. Here are three loaves of bread [illustrating], all white bread. This one [illustrating] is a loaf of Huber's Sunbeam white bread wrapped in waxed opaque sulphite.

9663 The wax probably has a hardening agent in it, but generically it is a waxed opaque sulphite.

Here is Freihofer's Old Fashioned white bread. It is wrapped in a waxed transparentized sulphite.

Here is another loaf of white bread. It is Food Fair's Lady Fair white bread, and it is wrapped in cellophane. Frankly, I don't know why they do it, with all due respect to du Pont and Sylvania.

Q. This one in transparentized sulphite, is that a material similar to your Transolite?

A. Yes. Transolite is our trade name, proprietary name, for that product.

Here are two packages of oatmeal cookies, and I would like to point something out here. This is Ivins oatmeal cookies, Old Fashioned oatmeal cookies. They are packed in a bag that is typical of a coffee bag, it has a greaseproof paper—in this case glassine actually, excuse me, and it has a liner inside of the duplex bag. I am quite sure Ivins did this because this package seemed more old fashioned to go with the oatmeal cookie idea. But of course I obviously don't know their thoughts.

Here are A & P's Jane Parker's oatmeal cookies wrapped in cellophane. I would like to point out that in my opinion this is one reason why I would never put oatmeal cookies in cellophane.

Q. You are referring to the cellophane packed?

9664 A. Because they are broken—you can see they are broken. I wouldn't care to buy that package myself.

9665 Q. Mr. Leinbach, are these from the same store?

A. The Ivins and the Jane Parker are from the same store and these loaves of bread are from the Food Fair Market.

From the A & P brought some Rajah cocoanut put in a cellophane bag. I also brought—it is the General Foods Bakers cocoanut package in which the liner is a barrier comprised of foil sandwiched between two sheets of glassine paper. These products are sold for the same purpose. They were side by side on the shelf.

From the A & P Market we picked up two packages, one of which is Excelsior buttered beef steaks; the other is Bennee frozen

beef steaks also called buttered beef steaks. One is wrapped in cellophane and the other is wrapped in a beautifully printed and very attractive wax paper.

Here is a very interesting example of neither that is like the other, so we joined. This is Fritos corn chips. The inside bag is lacquered glassine and the outside bag is moistureproof cellophane. They have tried to web the two sheets. In some cases we get people back to printed disfane or lacquered glassine and plain lacquered glassine, and in other cases we lose the whole case to cellophane.

From the A & P Market are two different sized packages of Campfire marshmallows; one of them a tray wrapped in cellophane and the other a group package in which the thing the customer sees is a printed opaque labelled paper and in-
9666 side is a cotton of wrapping waxed sulphite for moisture-proof protection.

Q. Those are by the same manufacturer?

A. Those are by the same manufacturer. In the A & P Market I bought the Jane Parker chocolate cup cakes wrapped in cellophane and carried in a tray, and also these two packages of Tasty Cake Company's products, both of which are wrapped in printed waxed glassine.

Q. One of which is also a chocolate cup cake?

A. Yes. The printed wax glassine has a fairly wide-spread usage on cakes—Interstate Baking in the west and Drakes here in the metropolitan area.

Here is one that didn't quite work out. That is not in glassine. They have been in cellophane.

Q. This is the fractional cracker pack?

A. Yes. Here I have the National Biscuit Company's Premium saltine crackers, also a unit package of a slightly different type.

By the COURT:

Q. What is the outer coating on——

A. This is what I call a labelled paper. It is not a glassine. I can't tell you exactly what it is, but I think it is a lightly waxed sulphite. We had a terrible time with this package when we sold it. This is our glassine on that package of crackers, Premium saltine crackers.

9667 By Mr. MCGLOTHLIN:

Q. Of National Biscuit?

A. Yes. Somebody in National Biscuit had an idea of putting cellophane inside that package. We came within a hair of not getting that business. It is a continuing battle with us.

Sunshine Biscuit started their pack in cellophane. They then came to us for lacquered glassine, which we supplied for a while, but they are on waxed glassine and we are supplying some of it.

Q. How about Schultz bread?

A. They are still on cellophane.

Q. That is a fractional package?

A. It is. Here is Quaker Oats puffed wheat. It is packaged in a chip board shell and then lined with our waxed glassine as a moisture barrier. It is that moisture barrier which keeps the things fresh.

Here we have the A & P Sunnyfield Wheat Puffs which are competitive, and they put them up in a cellophane bag. Also from the A & P we found that Seabrook Farms are selling their frozen corn on the cob as packed up in a fractional printed opaque waxed paper. Snow Crop has marketed their corn on the cob in printed cellophane. Those two are right in the same case. The consumer takes one or the other. The M & M Company in Newark
9668 for a long time marketed their candies in cellophane only. This is our paper. It is an opaque bleached kraft.

That brings out a point. I think a lot of the solution to this business of transparency is an illusion in the minds of the marketing people. These people put this package out and then it sold better this way than when they had it printed. My opinion is that when you look at a counter you can see the M & M brilliantly.

Q. You are referring to the small size package of M & M?

A. Yes. The large size is still in cellophane. But you notice they have adjusted that package to get the opaque face, and again we have more work to do on that.

Q. That is the same candy in both packages?

A. That is right. Here are four candy bars. I don't know if this exemplifies what I have in mind. Here we have a package of Chew-ets put up by Goldenberg in Philadelphia. They are packed in printed cellophane. Ludens of Reading, Pennsylvania have a gloss printed glassine wrapper on their 5th Avenue Bar. Gold Medal of Brooklyn on their Bonomo's Turkish Taffy use our lacquered pouch paper. The Hershey Chocolate Company uses our opaque glassine as the barrier immediately around the chocolate bar.

By the COURT:

Q. Didn't they use to use foil?

9669 A. Yes. That was a long running battle. May I talk about it?

Q. Yes.

A. During the war aluminum foil was excluded from uses of this type. They had to have moistureproofness and they had to

have resistance to foreign flavors and odors. We had done business with them for years and we had the opportunity of preparing a sheet which they would find suitable. They accepted our Snopaque glassine and a very interesting thing happened. As they put this thing in the market and began to run their machines they found that Snopaque had a greater tensile strength than glassine, and the fact that we were able to build into it a very considerable amount of the deadness of foil their production increased rapidly. They found no consumer resistance at all.

After the war there was considerable discussion as to whether they would go back to foil and they discovered it would cost them thousands of dollars a year in material costs but they would have to buy a large percentage more of packaging and machine production to keep the same output going through their plant because the machines could run faster on glassine. They stayed with glassine.

The Peter Kohler Chocolate Company, the same thing happened as the war went on, and we got in there with a substitute material.

9670 The Nestle folks felt that their traditional package was a foil wrapper on chocolate with a transparent glassine over-printed as a label around it and the blue printing indicated chocolate bars with almonds and the red printing indicated chocolate bars without almonds. After the war they felt they ought to get back to foil. We persuaded them to run a marketing test in New York City, which they did, using our glassine over the chocolate bar and their foil combination here, and they found out that the opaque glassine package was in much better acceptance than the old package which they thought was one of the citadels of the corporation. There are chocolate bars still put on the market in foil.

Here is a paper bag foil to show that the material is on the stand for the consumer to choose from.

Charms are put up in laminated foil and these folks put cellophane around the little pieces inside the package.

Necco Wafers are in glassine alone. There is a sequence I would like to point out. There are several packages of Beechnut gum here. Beechnut puts up their gum in two ways.

In this package they wrap the five sticks by putting on the wrapping machine a roll of foil and paper and then they put a roll of printed cellophane in exactly the same way in another position on the machine and as the cellophane comes down it passes over another roll which applies a sticky wax and the two webs are

9671 laminated together as a part of the wrapping operation.

They also purchase from one of the major foil producers a web which is made up of a heavier paper, in this case an imitation

glassine, to which is laminated a sheet of foil. The foil is printed to look like the cellophane and they run that web by itself.

Q. Without any cellophane?

A. Without any cellophane. We are working on them and I think we will have some success with this particular package which, as you see, is all paper. Protection-wise it does the job; cost-wise it is cheaper. We do have some bugs to overcome. From some marketing factors they have in their minds we hope to justify to them as being only in their minds and not in their customers' minds.

I thought that sequence indicated clearly the variation of the thing we are up against, the way we have to meet so many things. Your competition comes from so many angles. That was my morning shopping, Mr. McGlothlin.

Q. I want to have you describe one or two more examples, Mr. Leinbach. Will you tell us how cough drops are packaged and what Riegel's proposed package for cough drops is?

A. Most cough drops are put up in a wax cellophane liner with a chip board shell and over-wrapped with heat-sealing moisture-proof cellophane. We are trying to sell those folks on the
9672 idea of using a gloss printed carton with a wax laminated liner, and I think we can give them at least inner protection and some appreciable economy thereby.

Q. You said the use of your liner will take off the cellophane overwrap?

A. That would be our intention.

9673 Q. Now, will you tell us how individual service packages of Quaker Oats are now packaged?

A. Well, we had had that package for a long time as a waxed glassine lined chipboard shell. They then tried a sort of a waxed dipped combination but developed a package where they use a little carton that is open at one end, wrap that whole business in cellophane, and then bundle a bunch of them together in cellophane. We lost that business.

Q. Will you tell us what types of material are used to package potato chips, which is not among your examples there today?

A. They run pretty much the full range, sir. We sell a good many thousands of tons of glassine to the potato chip industry where it is used either waxed, lacquered or laminated. A lot of cellophane is used.

An appreciable number of potato chips are sold in tin cans. Some are sold in waxed paper lined or waxed paper wrapped cartons; foil laminations are used in quantity for potato chips.

I might say that at the moment, as many in this room know, that is one of our most intense areas of competition with cellophane.

Q. Well, I take it these examples this morning were illustrative rather than exhaustive, is that correct?

A. Oh, yes.

9671 Q. Is it true in general that glassine is sold or you try to sell it to the same people for the same uses as moisture-proof cellophane?

A. Very often.

Q. Now, speaking of end uses for a minute, I want to give you some flexible materials and have you tell me illustrative uses for which glassine and greaseproof compete with that material. Wax paper, for instance, you have shown us bread. Are there any others?

A. Bread is a shining example. We are perennially fighting off inroads of the wax sulphite manufacturers who try to break into the cereal packaging field. They try to improve their water vapor transmission rates, and when they think they have something, they try to come in, or try to sell the idea of an overwrap or whatever they can use. It has been a running battle.

Q. Vegetable parchment—I don't believe we had any examples of that.

A. Our wet strength greaseproofs as an industry are widely used on oleomargerine and some butter, which has traditionally been the vegetable parchment field. Lard, bacon wraps, have been put up in glassines as well as vegetable parchments.

Q. Cellulose acetate?

A. Bacon wraps I would say would be our main point there.

9675 Q. Cry-O-Vac?

A. Well, we compete with Cry-O-Vac for the frozen food producer's money. We put out a locker wrap on various frozen food packaging materials, mainly, I would say, the locker wrap in the plants where they put up poultry and certain meats where they could use Cry-O-Vac if they were so foolish.

Q. Pliofilm.

A. There have been pliofilm lined bags made for coffee packaging and they have tried to put that product over for the Silex coffee package, where I think at the moment we are dominant, although we did just recently lose a couple of them to cellophane. But I think we will get them.

Q. Polyethylene?

A. The polyethylene is fairly new. Actually we will put polyethylene on paper ourselves. Its qualities compete in greaseproofness, a certain amount of moisture vaporproofness, and that sort of thing. I would say our main point of competition there is in the machine parts packaging field at the moment. Also, incidentally, in some detergent packing on automatic machines for

small papers, the Transwrap or Stokes-type type of machine. Those are the ones I can think of at the moment.

Q. Saran, do you meet its competition anywhere?

A. Perhaps in the machine parts packaging field. I don't see much Saran around, sir.

9676 Q. How about unwaxed sulphite paper?

A. Well, both through the converter who would wax it and through some direct users there is competition there for the waxed paper area of packaging and also there are certain envelope uses, sterilized packages, and so on, where we compete with them, and on the small sugar packets, individual servings, we like to get that back on some of our papers. It has gone over to plain sulphite papers.

Q. Could you give us five or six of what you regard as the major end uses for your glassines and greaseproofs in the terms of the industry?

A. Crackers and biscuits, cereals, bread, baked goods, candy, sterilized adhesive bandages or gauze pads, that type of thing, I have forgotten the generic term for it, chewing gum; coffee is a big one; and numerous other small various uses.

Q. Now, you said these uses that you exemplified by physical samples were illustrative. Would you give us in your judgment some of the end uses in which you find the competition from cellophane most intense?

A. There is a terrific competition now going on in bread in the bake field, cakes, and as I mentioned before, potato chips; the snack specialty field, of which Fritos (indicating) are an example. It is all the time in a state of flux; we lose them, we get them back.

The same thing happens with cellophane. Frankly, almost
9677 any one of these barrier jobs here is a competing point, as you see. Even in cereal we have to compete with cellophane because a fellow can put his stuff up in a duplex-cellophane bag or a waxed paper barrier of some sort. It is a choice he has to make.

Q. Does glassine have complete dominance of end use to the exclusion of all other flexible packaging materials?

A. No, sir. I wish it did.

Q. Now, in your sales planning, to what extent do you find that people who are using cellophane for packaging are the actual or prospective customers for your papers?

A. Would you restate that? Would you repeat that question?

Mr. McGLOTHLIN. Will you read the question, please?

(The reporter read the last question.)

The WITNESS. The people who use cellophane are excellent prospects for our papers, because the reasons that they would use

cellophane in my opinion resolve into qualities which we can furnish in our material.

Q. Well, now, when you sell glassine, what characteristics of it do you emphasize in your sales approach?

A. We emphasize protective qualities such as moistureproofness, greaseproofness, resistance to flavors and aromas—we emphasize appearance, such as transparency or lack of that, if the thing requires; the eye appeal term we talked about before, but
9678 usually would break it down into brillance of printing, good opacity or something of that sort. We emphasize machine operability and economy wherever we can.

Q. Glassine was once the overwrap for cigarettes, was it not?

A. Yes, sir.

Q. Do you have any cigarette business today?

A. No, sir.

Q. Is there any other end use you know of that cellophane has completely pushed glassine out of?

A. No, sir, I don't know of any other.

Q. Now, once glassine was off cigarettes did it lie quietly or did it try to get back?

A. Well, certainly we have to try to get back. We have to keep our machines running. I think, if my recollection is correct, when we lost that business, which was a terrible blow to us, we had four paper machines in our Milford mill. We now have seven. So perhaps that answers your question. Actually there are nine machines in the Milford mill but seven glassine machines and the eighth runs packaging papers—if not glassines, it certainly runs packaging papers. I think that answers your question. In other words, we have grown considerably since that happened.

Q. Have you made approaches to cigarette manufacturers with proposed glassine packages?

A. Yes, sir, we do that regularly. I think there is a
9679 certain amount of tradition that they respect. They don't change their packages very easily.

Q. Would you tell us what the approximate volume of glassine sales are today as against 1930?

A. It is more than double, sir. I know that.

Q. In your judgment what is the explanation for that growth?

A. So many more things are being sold as unit packages, it has been completely important for the fellow who packages foods or other similar products to have his things in a form that the housewife can go into the supermarket or the grocery store or whatever it is and pick them up as a package, as much as she wants in one package.

Now, there is a very fundamental thing in packaging.—Before that let me say that it is very essential, of course, that when the

housewife or the consumer picks up that package, the product inside of it must be at least acceptable and certainly should be at its best, which means that it must be protected against those factors which would normally cause it to deteriorate, such as moisture or sunlight or loss of grease or loss of flavor. It is very fundamental in packaging that this protection problem increases, oh, I think I am safe in saying geometrically, as the size of the package decreases, for the simple reason that if you take any one of these packages and cut it in half, you have cut the unit weight
9680 in half, but you have not cut the area through which these deteriorating factors can work. You have not cut that in half.

Therefore, the smaller the packet, the more necessary is the high degree of protective quality. A little tiny packet of soluble coffee, for instance, must have a barrier that is just almost impermeable to water vapor. Actually even though they do put the larger package in glass, it would not need quite the same protection for the simple reason that each unit of weight inside that package is not exposed to the same unit area of inroad of the deteriorating factor.

Now, that is our field, you see. Furnishing these qualities, furnishing these functional abilities is where we come in, and we think that is why we are growing and will continue to grow in serving this continuing trend of smaller and smaller unit packaging of things which are more and more nearly in their final state of preparation: you just add water, add milk, do something like that, which again complicates the thing, because if you put two things together, when moisture comes in they are more likely to interact and spoil rather than simply if you had salt over here, baking powder here, and flour over here, in different packages.

I have been pretty voluble, but does that answer your question?

Q. I think so.

Now, you told us of points that you stress in selling
9681 glassine. Would you tell us some of the various means by which you promote your products? For instance, does the corporation advertise its products?

A. We spend over $100,000 a year in advertising at the present time.

Q. How many salesmen do you have out on the road?

A. Our own company has about twenty-five.

Q. Do you also have distributors and agents?

A. Yes. An appreciable proportion of our product is sold through distributors and resale channels, although that is not the rule in packaging papers, I must point out.

Q. Do you engage in any packaging service to customers as an aid to sales?

A. Well, that is another of our very most important sub points. We compete and have to compete with so many of these various different kinds of things that we have got to show economy, or we have got to show better performance, better operability on the machine, better protection, better something.

In order to do that, it just isn't good enough to walk in and make your claims. We must make a factual presentation based on tests, usually tests set up in conjunction with the customer, so that the conditions of testing are those which he will accept, rather than some arbitrary situation that we have conceived.

We operate a very considerable packaging laboratory,
9682 at least we think it is, for humidity control, temperature control and cycling conditioned rooms, heat sealing testing equipment, ovens, all the other appurtenances that go with it, and one of our strongest selling tools is this business of having a man work with you with his product to check the barrier that he is using against the barrier that we offer. We use that a great deal.

We also try, wherever we can, to see if we can't help him seek out that machine which will represent a good investment for him, a lower unit cost in his final package, a better operation, a better package, whatever we can do to help him in his packaging operation.

Q. Do you employ market surveys at all?

A. We do most of that ourselves. We do a certain amount of outside market survey work generally with relation to very specific things, to make a point, such as, for paper on chocolate bars, or some of these shibboleths, if you don't mind my saying.

Q. Would you tell us what in general have been the technical improvements in Riegel's glassines say over the last fifteen years? Do you make a better one now than then?

A. We can make more transparent, we can make stronger papers than we did then, a greater variety of papers to meet different requirements. Our laminations are much more moistureproof, our coatings are more variety, and we are doing a lot
9683 more work in these combination jobs of combining glassine with other materials, foils or films or whatever, and working with other people who do the same thing.

Q. To what extent do you think that the improvements in your materials or the improvements in du Pont's cellophane stimulate packaging as a whole? Does it have any effect?

A. If you will consider along with the improvements in the films or the papers themselves the improvements in their conversion, there is no question but they have a tremendously stimulating influence because they offer better protection, they enable the packager to do something which he has wanted to do for the last

five years but only now has found a farmer that will carry, and all that sort of thing.

Q. You told us that in selling you emphasized a number of different factors. Is it your experience that a customer selects a material on the basis of one factor alone or on a number of factors?

A. I don't think they ever select on the basis of one factor. I don't think they can. In the end they may balance it out in their own minds to some one thing which is the swing—it could be economy, it could be operability, it could be protection, it could be a lot of things, but it can't be done on a single factor.

Q. Well, to make it specific, to what extent do you find that a customer will choose a product on the basis of
9684 its transparency, disregarding its protection and disregarding its cost, disregarding everything else?

A. I don't think that that can be done. You have got to consider strength and use requirements, terms of service, conditions of exposure. I think—well, just strength, economy or any of these other things may be the deciding factor. There may be a point where the man weighed two things and in his own mind he may feel transparency is the thing that kicks it over here, let's say, on the cellophane side. That happens to us all the time. We have got to get back and point out to him that transparency is not always an advantage, it may be a great disadvantage in his product and try to swing it the other way. Or we may have to emphasize even more our protective qualities, our operational qualities, or whatever we have. But it can't be done on the single quality.

Q. Have glassine and greaseproof been in short supply at any time since 1940?

A. Almost continuously except for about the second quarter of 1948, as I recall, and I am very sorry to say, the second quarter of 1952.

By the COURT:

Q. Taking the packing industry as a whole, suppose I would say that cellophane took 25 per cent of the market, what would be the percentage that your product would take?

A. I don't know the total production of cellophane,
9685 your Honor. I think that the total production of glassine and greaseproof, I think it exceeds the total production of cellophane. I am pretty sure it does. Perhaps I could tell you this way. I think we account for more than 130 to 140,000 tons a year as an industry. That is my conception of our industry. I think if you measure that against the cellophane production, it will perhaps give you your answer.

The COURT. That is close enough.

Suppose we take a ten minute recess.

(At this point a brief recess was taken.)

9686. Mr. McGLOTHLIN. In connection with your Honor's question to the witness I did a computation during the recess. The witness estimated the production of products in which he is interested at 130 to 140,000 pounds, which works out to 260,000,000 to 280,000,000 pounds. Defense Exhibit 606 at page 1216 shows the national production of cellophane in 1950 was 262,000,000.

By Mr. McGLOTHLIN:

Q. Mr. Leinbach, you just said that glassine was now in free supply, I believe?

A. Yes, sir.

Q. When did it change from tight supply to free supply?

A. The change began in some mills along about early March and some mills were hit before others. It hit us most forcibly about the first week in April.

Q. You said that except for two periods up to the present your products have been in short supply since about 1940 or 1941; is that correct?

A. Yes.

Q. Can you tell us what would have caused that shortness in supply?

A. An increasing demand for protective packaging and no corresponding increase in productive capacity.

Q. How does the growth of your company in the period 1942 to 1952 compare with its growth during any other ten-

9687 year period?

A. We grew more during those ten years, I would say, 1942 to 1952.

Q. Yet despite that you had a shortage?

A. Up until very recently we had a short supply.

Q. You told us you considered cellophane customers or rather persons using cellophane as prospective customers for your products. Suppose a man is using cellophane for packaging potato chips or coffee or crackers, do your salesmen call on that man and try to sell him glassine?

A. Very decidedly. In our sales efforts you must include the sales efforts of our converters just the same as you would for any other packaging film or material. Our salesmen and our converters' salesmen who are selling glassine packages very actively canvas people who are using cellophane.

Q. Suppose they don't get the sale the first time, do they go back?

A. Oh, they must. You usually don't get the sale the first time. It takes a long time to swing a man.

If you want certain examples I would like to point out the potato chip industry in the southeast right now. I will mention company names if you insist, but I would just as soon not. There

are some people changing from glassine bags to cellophane bags
at this particular moment. They have done it before, and
9886 and we don't feel that we have permanently lost that. We
do know we are going to have to fight to get back in, and
we have good reasons for it. We think we have such reasons and
in time we will show them why they should be able to get back
to our product as they have done before.

Q. You say you will have to fight. Will you fight to get them back?

A. Oh, very definitely.

On this cereal packaging in here, people who are putting up cereal in duplex cellophane bags, we are very actively trying to prove to them that there is a better way to sell their product and we think we can prove it.

Q. I take it from your potato chip example you have the converse of that situation with cellophane salesmen calling on your customers, too?

A. That is really the converse. That is just what happened to us.

Q. Can you tell us what effect, if any, the price reductions in cellophane during the period 1931 to 1941 had on the price of glassine?

A. It kept our prices down. Except where we can offer a functional quality that the customer agrees with us surpasses what he would get in his particular cellophane that he was buying, cellophane is a very definitely limiting factor on our prices. There is no doubt about that.

Q. You told us that improvements in cellophane in
9889 one or two instances improved and stimulated your quality.
Tell us what effect it would have on your sales if cellophane quality deteriorated?

Mr. MIXICUS. Objection, your Honor. It calls for an assumption on the part of the witness.

The COURT. I agree. Objection sustained.

By Mr. MCGLOTHLIN:

Q. When you are able to put out a glassine that is superior to cellophane what effect does it have on your sales?

A. When we are able to sell it.

Q. When cellophane comes out with a new type that is superior to the type of glassine you have been selling

Mr. MIXICUS. Objection to this entire line of questioning. There has been no foundation laid that there was ever a cellophane inferior to glassine or that there was a glassine inferior to cellophane.

Mr. MCGLOTHLIN. He has not listened to the testimony, your Honor. Mr. Leinbach says that exists.

The Court. Are you dealing with a hypothetical improvement?

Mr. McGlothlin. No, sir, an actual improvement. He testified that he came out with pliolite coating, for instance, which was better than moistureproof cellophane.

The Court. I think the difficulty is engendered by the lack
9690 of specifically in your question, so let us take a type of cellophane that is better than an older type and ask the witness what happened then.

By Mr. McGlothlin:

Q. When you perfected your pliolite coating glassine what effect did it have on your sales?

A. They increased.

Q. Were you able to take customers who were then using cellophane?

A. Yes, sir.

Q. You have told us that subsequently cellophane with improved moistureproofness appeared; is that correct?

A. Yes, sir.

Q. Did that improved moistureproofness cellophane take customers from pliolite coated glassine?

A. I would say that it did. I certainly can testify that it did because the cellophane people came in to those customers who were using pliolite glassine and worked very hard to get them to stop using it and to use the more moistureproof cellophane, which they then had to offer. Does that answer your question?

Q. Yes. Will you assume now that cellophane prices increased, as they have on one or two occasions since the war? If glassine prices are not raised at the same time or shortly thereafter what effect does that have on your sales?

Mr. Minich. Objection again, your Honor. It is
9691 still an assumption.

The Court. No, I think there is testimony in this record that the price of cellophane has varied.

Mr. Minich. But he is drawing the assumption on the price of glassine. There is no record made to that effect.

The Court. Well, ask the witness that question first.

By Mr. McGlothlin:

Q. On each occasion when cellophane prices were raised after the war were glassine prices raised in a short period thereafter?

A. In a relatively short period, yes. There were times when the increased costs that were put upon us forced us to raise our prices, and we did so. I would say that we were delighted when it became necessary for the cellophane companies to increase their prices, too, because the margin was ever narrowing, and economy is one of our great points.

Q. You say you were delighted because the margin was narrowing. What margin are you referring to?

A. The difference between the nine-per thousand square inch cost of our materials and the per thousand square inch cost of cellophane.

Q. There was a period in the thirties, was there not, when cellophane prices were constantly decreasing?

9692 A. Yes.

Q. On each occasion did glassine prices decrease within a short period thereafter?

A. Not in that close relationship, sir, because we were at that time well below them even on our lacquer glassines.

Q. When cellophane prices decreased without a corresponding decrease in glassine prices what effect did it have on your sales?

A. The definite effect was to cause us to lose business.

Q. Are your sales affected by whether cellophane is in free supply or in short supply?

A. Very definitely.

Q. How?

A. If cellophane is in free supply we find our customers tend to think very seriously about using cellophane—when cellophane is free they think pretty seriously about using cellophane; when cellophane is in very short supply they assure us that we have the best product they ever saw and they will stay with us forever, and they would just like to have us sell them some of our product.

When cellophane recently became fairly free—I don't know exactly about the cellophane mills—we felt it very quickly
9693 in our coating department. That was the first part of our company to begin to slack off a little bit, and that was almost simultaneous with the—it was before the announcement that cellophane went off allocation, but it was almost simultaneous with the general knowledge that there was no need to allocate cellophane any longer.

Q. You talked a good deal, Mr. Leinbach, about the protective qualities of cellophane. Were you referring primarily to moistureproof cellophane?

A. Yes, sir.

Q. To what extent do your products compete with nonmoistureproof cellophane?

A. There is not much competition there. I don't see much PT cellophane, ordinary uncoated non moistureproof cellophane.

Q. Have imports of glassine been any appreciable factor in the market in the United States?

A. Recently they have not been very great factors. I would say it was the second quarter again of 1948 and then a little bit in 1949 there was some sizable shipments of Scandinavian glassine. I be-

lieve. They are not an appreciable factor in our market at the present—in our sales.

Q. Can you give us the approximate dollar figure of Riegel sales in 1951?

A. We sold about thirty-seven-and-a-half million dollars in 1951.

9694 Q. About what percentage of that was glassine, greaseproof, and related products?

A. Packaging papers I would say it was in the magnitude of 60 to 50 per cent., some little less than perhaps two-thirds, somewhere in there.

Mr. McGLOTHLIN. Your Honor, I want to offer Defendant's Exhibit 1005.

(The brochure of Riegel Paper Corporation was received in evidence and marked, "Defendant's Exhibit No. 1005.")

Mr. McGLOTHLIN. Your witness.

Cross-examination by Mr. ROACHE:

Q. Mr. Læinbach, is this Riegelite contained in your company's brochure the most transparent that you manufacture?

The COURT. The fifth from the top, Mr. Læinbach?

A. Riegelite?

Q. Yes.

A. I would think Riegelite is the top sample on the right-hand side.

By the COURT:

Q. What is No. 5?

A. Transolite.

9695 By Mr. ROACHE:

Q. This is the most transparent. Why can't I see you through it?

A. I won't say it is the most transparent. I would say it is the most transparent waxed paper we make.

Q. Why can't I see you through it?

A. Because of the refraction of light as it passes through the paper from a distinct object, and things are not packaged that way. That itself is not a measure of transparency.

Q. What about this package of chocolate-coated cookies up here?

A. There is transparency.

Q. That is wrapped in cellophane?

A. This is transparent, this is transparent and this is transparent in other degrees.

Q. There are degrees then?

A. There are.

Q. Do you sell your Riegelite for a type of packaging like this?

A. We would, as a rule.

Q. Do you?

A. If you are asking me specifically whether Riegelite is on a tray of chocolate cup cakes, I can't answer you. I don't know. I won't say that it isn't and I won't say that
9696 it is. I know that converted glassines are on trays of buns and rolls and things like that, in a very similar type of service.

Q. On direct you mentioned that you were a member of the Packaging Institutes?

A. Yes, sir.

Q. Are there divisions of the Packaging Institute?

A. The technical committees have divisions but there are no divisions of the packaging industry so far as membership is concerned. At one time, years ago, there was a Supply Division, a Users Division and a Machinery Division but that no longer exists.

Q. Was there a Glassine Division?

A. No.

Q. Transparent Division?

A. No.

Q. You stated on direct that you could vary transparency?

A. Yes, sir.

Q. Can you vary transparency to glass clear transparency?

A. No, sir.

Q. Is Riegelite the best degree you can get?

A. No, sir.

Q. What is the best?

A. Transparent waxed sulphite without being marred, the No. 5 sheet on the right-hand side, are better transparent
9697 foils than Riegelite but not the same function. Lacquered glassine will give better transparency than waxed glassine after a little handling. I refer you to the fourth sheet up from the bottom MST Diafane, which is the most transparent one in the book.

Q. What is the volume of your sales of diafane to your total sales, percentage of your sales?

A. I can't answer that question precisely. I don't have the figures here.

Q. Could you approximate?

A. May I do a little calculation for my approximation? I don't think it would be over 5 per cent. of our total sales. 5 over 65 roughly would be about 7 or 8 per cent., something like that, of our packaging sales.

Q. What is the most vitally used type of glassine for packaging purposes?

A. Do you mean the largest dollar volume or the largest tonnage or most customers?

Q. Total sales, tonnage. Could you indicate in this brochure which one?

A. These are rather private things. I will mention it if you want to know.

The COURT. If the witness has a valid reason for not wishing to disclose the intimacies of his business I would be prone to
9698 protect him unless you can show that your question is very critical.

Mr. ROACHE. I merely wanted to point out that their most transparent material was a very small volume of sales as compared to their other grades.

The WITNESS. I will concede that and certainly say that our less transparent functional grades are in larger volume. Does that satisfactorily answer your question?

Mr. ROACHE. Yes.

By Mr. ROACHE:

Q. When you have taken business away from a company who was formerly using cellophane did you take that business away on the grounds of transparency or for some other factor?

A. As I mentioned before, I don't think that you can judge a package on a single function. If we didn't have the same degree of transparency of cellophane, obviously we sold higher on other qualities we have. We might have taken away on the grounds of economy, performance, eye-appeal or brilliance of printing.

Q. Which of your lacquered glassines are higher in cost than cellophane?

A. Pliolite coated glassines. RS is our term. May I point out, too, that we keep using these terms glassine and cellophane as though they were all one thing. Our pliolite coated glassines are more expensive than 300 MST cellophane on a per thousand square inch.

9699 Q. That would be the comparable type of cellophane you would be selling against?

A. As far as I know. I am not a cellophane expert. We sold a good bit of a lacquered pouch paper, which is a plasticized opaque bleached kraft, which is more expensive to use than cellophane and some users prefer to use cellophane and some use our material.

Q. You mentioned the eye-appeal that glassine had, its brilliant printing and the various colors and the wrapper itself. Does not the product which is being wrapped sometimes have eye-appeal itself like iced cookies?

A. You are asking my opinion. It is the customer's opinion that matters. I don't think those broken oatmeal cookies have

eye-appeal. Some things look good to me. From there on it is what is in the customer's mind.

Q. You agree that the material to be used on a product as a wrapper is a wrapper that the customer prefers for whatever function he wants that wrapper to perform?

A. Certainly.

Q. If the customer wants a glass clear transparency he is not going to buy waxed paper?

A. If he can get all the other qualities and he feels he should have that degree of transparency I would presume he would buy that.

Q. If he wants the type of wrap to put on his product
9700 for a product which he is selling that has a small margin of profit he is not going to get a waxed paper or waxed sulphite?

A. I don't know that that is true. A package has a final cost after it has been wrapped and gone through printing. The cheapest material does not always yield the lowest final cost. In their field where a man cannot afford to pay more money, we have some products in limited production which do cost more. I would like to point out that transparency is but one of a multitude of functions.

Q. To sum this discussion up, you would agree that the sale of other wrapping material depends on the desire of the customer as to what function he desires or what function he wishes to put emphasis on as to economy, transparency and so forth?

A. And what he finds necessary.

Q. And what he desires?

A. All right.

Q. Would you care to tell me what percentage of your glassine is used as an inner wrap or inner liner?

A. I would have to estimate that for you. I don't think it is over half. It may be. It is 50 per cent. plus or minus somewhere in the 10 per cent. range. Much of it is used in bags as wrappings in which it is not a liner. It is the package itself.

Q. As a liner there is no importance to visibility; is
9701 that correct?

A. I wouldn't think so, but the people we tried to sell, National Biscuit and Schultz, for crackers, I don't know whether they would think so or not but it is there.

Q. Did National Biscuit at one time desire to wrap their fractional crackers in cellophane?

A. The ultimate purpose, when the machine came into operation, was for a waxed glassine. Prior to the setting of that purpose, the time they took in deciding what kind of equipment to

get, to build or use and all through the preparatory stages, we followed the thing as closely as we could and I would say up to the last minute we didn't know whether these fractional packages were going into cellophane or staying in glassine. I would say there are people in National Biscuit who think they should be in cellophane.

Q. Do you know why they didn't wrap them in cellophane?

A. I don't think I really should answer that question. It was National Biscuit's decision. I think I know why. Do you want my opinion?

Q. Yes.

Mr. GESELL. I object. He says he doesn't know.

The COURT. Yes, I agree with you. Objection sustained. No guessing.

Mr. MINICUS. Throughout the direct testimony this man has given his opinion.

9702 The COURT. He said he didn't know why National Biscuit made the change. What further could you get from the witness when he says he doesn't know? I am not interested in guesses.

Mr. MINICUS. He has given his opinion throughout the direct testimony as an expert.

The COURT. But not to this particular situation.

Mr. MINICUS. Yes, sir.

By Mr. ROACHE:

Q. Do you agree with Mr. McCurry of National Biscuit Company in his statement that they have realized that they have to switch to cellophane on potato chips in order to be in competition?

Mr. GESELL. Could we have the place of the statement, your Honor?

The COURT. Yes. What is the source?

Mr. ROACHE. It is in the deposition which was taken.

Mr. GESELL. I would like to have the s[illegible]ement read to the witness and asked if he agrees rather than have a translation of it.

Mr. ROACHE. I don't have the statement here.

The COURT. If you are prepared to ask the question it seems to me you ought to have your source material available so we can go to the deposition and see the page and read the question put

9703 to the deponent and read his answer and ask the witness if he agrees or does not agree.

Mr. ROACHE. I will do that shortly.

9704 By Mr. ROACHE:

Q. You stated, Mr. Leinbach, that you do not have any cigarette business today, is that correct?

A. That is correct, sir.

Q. Do you feel you are in competition with cellophane for cigarettes?

A. I do.

Q. What kind of competition is that?

A. I do because I am continually trying to get in just as the party out of power is continually trying to get to be the party in power, they may not have the office at the moment but are in competition for it. We don't have the wrapper on cigarettes. Heaven knows whether we will ever get it, but we will certainly keep going. We certainly are in competition with the tobacco people on chewing tobacco, unless I am getting afield from your question.

Q. You feel you are in competition although you don't even sell them anything?

A. We sell those same companies.

Q. For cigarettes?

A. Not for cigarettes. We feel we are in competition as we compete for their interest and their business in trying to get it. We may not have won the race, but we are still running.

Q. What is your definition of competition?

9795 A. My definition of competition is trying to get the other man's business and getting some of it in some cases.

Q. Would a man who is selling a wooden house be in competition with a man selling a brick house?

A. He surely would in my case.

Q. Would a man selling sea green slate be in competition with black slate?

A. You mean for the roof of that house?

Q. Yes.

A. I presume that he could be.

By the COURT:

Q. How about the man selling strawberry ice cream and vanilla ice cream?

A. Well, if he sells on strawberry and the other man has only vanilla, they must be in competition. There is a choice to be made and I want to get my ice cream money.

By Mr. ROACHE:

Q. You stated there was a shortage of your product from 1941 for a ten-year period.

A. Approximately.

Q. Were your customers on allocation during that time?

A. During much of that time they were.

Q. Could you state what years specifically they were on allocation?

A. Not specifically, but very closely, approximately they were on allocation through '41 to about '47. Allocations
9706 weren't really necessary—we had the figures there, and all that sort of thing, but didn't necessarily exercise them because things took a little slide and hit a dip in '48. We had to go back on very strict allocation in 1949, 1950 particularly, and '51 was a very difficult year for us, in a nice sort of way.

Q. Now, this 900 million pounds, or approximately that amount, that you stated was your tonnage of sales, did that include other papers besides packaging papers?

Mr. McGLOTHLIN. I believe the answer was addressed to the glassine and greaseproof industry rather than Riegel.

The WITNESS. I wanted to make that point. That is not our company's production. That is my estimate of our industry's production, that is, glassine and greaseproof for packaging uses almost entirely.

By Mr. BOYCHE:

Q. It does not include other papers?

A. No, sir.

By the COURT:

Q. Mr. Leinbach, what is the basic reason for allocation?

A. A fair distribution from the standpoint of prior purchase by your customers, in the first place, and in the second place, your own philosophy in operating your own business to bring you out of such a market in those fields of purchase or selling to the
9707 customers that you think serve your best interests in the long run.

There is another point that goes with it, and that is that each one of us always has some customers who are big enough that by the weight of their purchasing power they would tend to exclude smaller customers. And if you resort to mathematics of past performance you get a fair mathematical means of distributing your product which will protect these other perhaps newer uses you are going to depend on five or ten years hence, in a purely mathematical way, so that your big customers can't come to you and say, "You are very arbitrary about this thing." It is that sort of thing, sir.

Q. Do you know much laminating with glassine?

A. Yes, we do a good amount of laminating with glassine.

Q. What percentage of your business is that?

A. I am awfully sorry I didn't come prepared with actual production figures.

Q. Could you approximate it?

A. It is a little difficult; production rates vary on so many of those things. Oh, it might be in the magnitude of ten per cent.

maybe a little higher. I am really taking these figures out of very thin air right at this point.

Q. What is the purpose of laminating another material to glassine?

A. Very often the combination of two—well, could I answer the question by starting out in this way: Any glassine,
9708 for instance, any one of our glassines, or any other packaging material, and very often any given grade within that other packaging material, has certain unique qualities. There is no question about that.

Now, there are times when you wish to combine two different things to get a combined set of qualities that perhaps you wouldn't have in either one of them alone or either one combined with itself. Glassine is laminated to foil very often, it is laminated to cellophane sometimes; cellophane is laminated to foil; polyethylene is laminated to glassine, and so forth, to get a combination of qualities. Sometimes it is deadness, sometimes it could be appearance, if that is a factor.

Q. The point I was making was that these products do have unique characteristics all of their own, that is why you laminate one to another?

A. Well, within any given kind of packaging material there are unique qualities if you will measure with a very considerable precision.

Q. It must be necessary or you wouldn't laminate, would you?

A. It certainly is desirable.

Q. You laminate glassine with cellophane, too?

A. We have.

Q. In Fritos, that package you have there, it is laminated with cellophane?

9709 A. Excuse me. That isn't laminated. These webs are separate. The only thing that combines them are the seals, top, bottom, and side seals.

Q. What is the purpose of two wrapping materials?

A. Well, they want two moisture barriers to start with rather than one. One won't carry the package; they need two. I think the glassine should be inside—in fact, I think they should both be glassine from the standpoint of light protection. Apparently these folks don't agree with me on that.

If you want to know again why they chose cellophane on the outside and lacquered glassine on the inside, the combination of the two, I can only give you my opinion. I presume it is light protection that keeps the lacquered glassine in the package.

Q. The customer prefers the cellophane on the outside, does he not?

A. He may. Apparently he does. He put it there.

Q. It is on there?

A. Yes.

Q. It must have some characteristic then that the other doesn't have?

A. Not necessarily, if you don't mind my saying that. I think it has a desirability in his mind at the moment that the other may not have. We might be able to break that down. We do sometimes.

9710 Q. In the customer's mind it has a characteristic?

A. Yes. We can break that down sometimes and do.

Q. Now, in discussing the fractional packaging of the National Biscuit's crackers, this is Mr. McCurry's testimony on page 87 of the deposition: The question was asked—

The COURT. Who was he?

Mr. ROACHE. He is Mr. McCurry who is with the National Biscuit Company, your Honor. He is manager of the packaging division of the purchasing department.

By Mr. ROACHE:

Q. The question was asked, "Then the fact that there is a shortage of it—" meaning cellophane—"has nothing to do with the fractional wrapping of crackers?" His answer was: "I say to you, if there was plenty of cellophane when our company started in fractional packaging, I believe that our sales department would have insisted on the same packaging."

A. On this same package?

Q. The cellophane. He was speaking of another cracker wrapped in cellophane. Do you agree with that statement?

A. I am confused. I don't understand it. To the best of my knowledge, when National Biscuit started out with their fractional packaging, at the time of the actual purchase in the beginning their first package was this same one; they used waxed glassine on the fractional units. I didn't think that question coincided there. Perhaps we could work out what the

9711 difference is. Would you care to read it again?

Q. On page 85 the question was asked, "We spoke a while ago about fractional wrapping of crackers?

"Answer: Yes.

"Question: And you said you used, was it a wax?

"Answer: We are using a wax glassine.

"Question: Why don't you use cellophane?

"Answer: If we went by the wishes of our sales department we would be using cellophane.

"Question: Why do they want it wrapped?

"Answer: Because a lot of our competitors are doing it and they feel if we go out with something we ought to be the same as the other fellows, and with the tremendous quantities of cello-

phane that we are using, we are just not able to do it. We just couldn't do it."

That is what he had reference to when he said, "Our sales department would have insisted on the same packaging."

Mr. McGLOTHLIN. I don't know whether it is or not. That was two pages later that he said about insisting. I don't know how he was referring to it before he got to it.

Mr. ROACHE. I could read the rest of it, your Honor, but that is what it has reference to.

Mr. McGLOTHLIN. I am perfectly willing to have him read it all, but I don't want him to characterize it as he goes along. He says a man on page 85 refers to something he said on
9712 page 87, which doesn't seem possible.

The COURT. Well, what do you suggest, Mr. McGlothlin?

Mr. McGLOTHLIN. I have no objection to his reading this transcript and asking, does Mr. Leinbach agree with that statement, which I understood he was going to do, but now he is explaining the statements back and forth, and I think erroneously. That is what I am objecting to.

The COURT. Now you are going back to page 87?

Mr. ROACHE. I read the previous statement merely to explain to Mr. Leinbach what was meant by, "Our sales department would have insisted on the same packaging," what they referred to. But rather than take the time to read the whole deposition, which will come in later anyhow, I will skip the point.

By Mr. ROACHE:

Q. Are you acquainted with a Revelation wrap, Mr. Leinbach?

A. Yes.

Q. Could you describe it?

A. The Revelation wrap to me is a bread wrapper made up by combining two strips of waxed sulphite with a strip of cellophane between them so that when the bread is finally packaged there is a transparent band through the center of the package although the ends of the package are covered by wax sulphite.

Q. The function of the cellophane in that package is for visibility?

9713 A. Yes.

Q. So it does have a different function than the other part of the wrap?

A. Yes.

Q. Are you familiar with any objections made by the Doughnut Corporation of America to Diafine's lack of transparency and lack of high lustre?

A. No, I can't say I am. I know we had some business over there which we lost, and if that is the reason, that could be the

reason. It is a nice suggestion. I forgot that. We will go back there. I am not trying to be facetious either.

Q. When glassine is used on a bag machine, is it not more brittle and subject to more turning than cellophane?

A. Oh, glassine runs beautifully on bag machines. We get trouble—cellophane gets trouble too, everybody has complaints once in a while, but there are thousands and thousands of tons of glassine running over bag machines.

Q. Is not glassine subject to more puncturing on bread wrapping than cellophane?

A. One of the functional qualities of cellophane is that it has a higher initial burst; once fractured, however, it separates much more easily than glassine.

9714 Q. Do you know what wrapping material the A & P is using for their baked goods today?

A. I pointed out here—this is Lady Fair, Food Fair. I saw a lot of their white bread wrapped in cellophane this morning, and I think from—I don't understand why they do it.

Q. You feel they have a reason of their own, though, do you not?

A. I am sure they are very reasonable people, but they are also customers; but I don't see the logic of that at all.

Q. Which brings us back to the point that it is the customer who decides what he wants to use as a wrap?

A. And he often changes his mind, sir.

Mr. ROACHE. That is all.

Mr. MCGLOTHLIN. I have just one question.

Redirect Examination by Mr. MCGLOTHLIN:

Q. Mr. Lambach, you were asked about slate roofs, I believe, as to whether they compete. Will you tell us whether your package is used and then thrown away by the customer?

A. Oh, yes, almost inevitably.

Q. Is it what you call a wasting product?

A. Well, I haven't called it that. I think the word "expendable" or "dispensable" would apply more to the flexible package. You open the package, eat the contents, and throw the thing away, burn it or put it in the trash can.

9715 Q. So that when a man buys your material this month he is in the market for additional packaging material the next month, yours or somebody else's?

A. Depending on his buying habits, whether it is a week or six weeks; but he has a buying cycle.

Q. The same thing is true when he is buying cellophane; this month he is in the market for more cellophane or another material within a month or so?

A. That is right. Almost all of our customers and almost all of cellophane's customers are open to change at any time.

Mr. McGOHEY. No further questions.

Mr. ROSCOE. No further questions.

Mr. GESELL. Does your Honor wish to start a witness now?

The COURT. Whatever your pleasure is.

Mr. GESELL. I think it might be well to start after lunch.

The COURT. Recess to 2 o'clock.

(At this point a recess was taken until 2 o'clock, p. m., the same day.)

9716 2:00 O'CLOCK P. M. THE SAME DAY.

Present: As before noted.

Mr. MINICUS. I would like to, for the record, correct a couple of errors. Transposition of numbers of exhibits as they appear in the record now: At page 6649 the exhibit presently reads Government Exhibit 2198 is offered for identification. That is a transposition and should read Government Exhibit 2918. Another one at page 6650 now reads 2197. That should be 2917.

The COURT. Gentlemen, straighten it out after this afternoon's adjournment.

Mr. GESELL. We call Mr. Fred Olsen.

FRED OLSEN, called as a witness on behalf of the defendant, was duly sworn and testified as follows:

Mr. GESELL. If your Honor please, Mr. Olsen is Vice President for research and development of Olin Industries. He appears here under subpoena.

He conducted the negotiations with Dupont leading to the license agreement which in this case is known as Defendant's Exhibit 974, and has from the outset been personally concerned with Olin's various plans to enter the cellophane business as well as with some phases of the company's operations since they have entered the cellophane business.

9717 He will testify on four general topics: The circumstances of Olin's early interest in and efforts to get into the business; the circumstances under which they sought a license from Dupont; the negotiations with Dupont, and the way the company has developed its business since then and its program for the future.

Direct examination by Mr. GESELL:

Q. Will you state your name, please?

A. Fred Olsen.

Q. Mr. Olsen, what is your position with Olin Industries?

A. Vice President for Research and Development.

Q. How long have you worked for Olin?

A. Since May 1929.

Q. Did you have any professional training before you went to work for Olin?

A. I was trained as a chemist and have a degree of Bachelor and Master from the University of Toronto.

Q. In chemistry?

A. In chemistry.

Q. Can you tell us, Mr. Olsen, a little bit about what Olin Industries is, the nature of its manufacturing activities, where the company's head offices are and how it is set up?

9718 A. The company is operated as a group of divisions, such as the Gun and Ammunition Division, the Explosives Division, the Metals Division, Electrical Products Division, Cigarette Paper Division and Cellophane Division, and its headquarters are at East Alton, Illinois.

Q. You are a director of the company?

A. I am a director of the company.

Q. What are some of the products it makes?

A. Guns, ammunition, sheet brass, various types of explosives including smokeless powder and high explosives, flashlight batteries and cigarette paper and fine papers and also cellophane.

Q. Do you have an interest in a company known as the Harwid Company?

A. And also in polyethylene sheeting which is manufactured by the Harwid Company.

Q. Approximately how many employees does the company have, Mr. Olsen, offhand?

A. Perhaps 15 or 16,000.

Q. Am I correct in understanding that the consolidated assets of the company and the net sales of the company are correctly set forth in the recent annual report of Olin Industries?

A. Yes.

9719 Q. Can you tell us whether that means that the assets are in the neighborhood of $176,000,000, is that right?

A. Yes, $175 million to $180 million.

Q. What are the approximate gross sales of the company?

A. About $165 million to $170 million per year.

Q. How long, Mr. Olsen, have you been responsible for the company's research and development activities?

A. Since May, 1929.

Q. To what extent over that period have you participated in formulating the policies and decisions of the company as to what lines of business it would go in or as to how it would develop?

A. Well, throughout the time I have been engaged in policy-making for the future progress of the company, the degree of responsibility has increased as the years have passed by, and today I think I have a quite major part in the charting of the future of the company.

Q. Well, Mr. Olsen, has that been decided over the years by one man or in consultation with others, or how has that developed?

A. Well, my own association with the president and the other officers of the company has been a very intimate one. We are still a relatively small company, and the management is quite closely concerned with all the aspects of the company's business.

9720 Q. Are you familiar with the negotiations and policy decisions reached leading up to Olin's entry into the cellophane business?

A. Yes, sir.

Q. By the way, Mr. Olsen, to what extent have you yourself been interested over the years in fields of cellulose technology?

A. Well, I have been engaged in cellulose research for more than thirty years and all of the time that I have been with Olin Industries or Western Cartridge Company, as it used to be known, we have conducted celluiose research.

Q. Well, now, can you tell us how it happens that your company has conducted and been interested in cellulose research?

A. It initially was related to the fact that one of the main ingredients of ammunition is smokeless powder and smokeless powder is essentially nitrocellulose which is obtained by the nitration of cellulose. Therefore as a means of controlling the quality of our powder we conducted considerable researches on the purity of cellulose.

Q. When did Olin first to your knowledge consider manufacturing cellophane?

A. Well, from the very time that I came with the company there were conversations about the desirability of getting into the film business. My own immediate activity in that field started about 1934 in the discussion of the study of the making

9721 of the film.

Q. Do you recall that in 1929 there were some discussions in the company with Wolff, a German manufacturer, with respect to making an arrangement with that company to go in the business?

A. Yes, I am familiar with that in general.

Q. Can you tell us why those negotiations didn't go through at that time?

A. Well, shortly after 1929 there came a thing we called the depression which put a serious stoppage on expansion ideas certainly in too many new fields, and it was several years before we were able to get our courage to the point of embarking in something that we knew was going to be a very major effort.

Q. Did you renew those negotiations at some later date?

A. In 1931 representatives of the Wolff Company came to East Alton and visited our laboratories, and we had numerous discussions at that time.

Q. Did you participate in those discussions?

A. Yes, I did.

Q. Did you visit Germany and examine the Wolff process?

A. In 1936 I visited Germany and saw the plant, the cellophane plant of the Wolff Company.

Q. As a result of those negotiations did you reach some decision as to whether or not you would embark on the business with Wolff?

A. No. We were dissatisfied with several features of the
9722 Wolff process. It has certain technical obstacles that we did not think would let it compete favorably with the processes being practiced in this country.

Q. Is that why you didn't go ahead with Wolff?

A. I think that was the main reason, the lack of economy on the one hand and also the feature that we didn't see any way of making a moistureproof cellophane without infringing on du Pont's patents, and our studies of those patents had led me to believe that it was an unwarranted business risk to take.

Q. Well, now, the Government suggested in this case, Mr. Olsen, that the reason you didn't go ahead with Wolff at that time was because Wolff found out that du Pont and Olin had a common stock interest in Equitable Powder Company?

Mr. Minicus. What time are we talking about now, your Honor? The last questions I heard on point of time were back in the later thirties.

Mr. Gesell. That is the time we are talking about, GX. 1418.

Mr. Minicus. What time is it, your Honor? I still don't know the date Mr. Gesell means.

The Court. Well, what date does the exhibit reflect?

Mr. Gesell. The contention has been made, your Honor, by the Government that the reason du Pont should be criticized here is because in some way their interest in Olin prevented Olin from
9723 going ahead with Wolff. And I am asking this man who had the negotiations whether or not that is the fact.

The Court. Well, I think that is the question that we want answered, but I can't get the significance of this time factor that you have raised, Mr. Minicus.

Mr. Gesell. Neither can I.

The Court. What is the relevancy of it?

Mr. Minicus. Mr. Gesell is attempting to draw out answers about when certain events took place between Olin and Wolff. I am just asking him what date he is speaking about at the present time that these things are supposed to have taken place.

Mr. Gesell. Well, the witness has just testified that in 1929 they had negotiations.

The Court. We are now down to '36.

Mr. Gesell. And that they continued all the way up to '36. He has given the reasons why they didn't go ahead, and now I have asked him whether at any time the reason he didn't go ahead or Wolff didn't go ahead with you was because you understood or Wolff understood that du Pont had some common stock interest with Olin.

The Court. That is a proper question.

The Witness. In my judgment that had nothing to do with the case at all.

By Mr. Gesell:

Q. Did that play any part in your decision at any time?

9724 A. It never entered any discussions that I knew about at all.

Q. Did du Pont ever ask you not to go ahead?

A. No.

Q. Did Wolff ever mention that interest to you in the negotiations?

A. No.

Q. Then it played no part in your decisions at any time?

A. None whatsoever.

Q. Now after that, Mr. Olsen, did Olin attempt to develop its own process for making cellophane?

A. Yes. We continued with our studies of film manufacture and even completed pilot plant scale operations for certain film types, more specifically for cellulose acetate, because that seemed to be a material that was free from any major patent difficulties.

Q. Did you also attempt to make a form of cellophane by the cuprammonium process?

A. We conducted experiments on cuprammonium but we did not mature those experiments until several years later, about 1944.

Q. When did you first start experiments on the cuprammonium process?

A. In somewhere around '38, I believe, '38 or '39.

Q. And those studies continued on into the forties?

9725 A. No. Those studies were largely terminated because in 1939 we became seriously engaged in military operations and in developing powder making processes, and so forth. So we had to use our available manpower on something of immediate concern.

9726 Q. What is this cuprammonium process?

A. It is a process that is similar in its general end product

to cellophane itself, but instead of going through the viscose chemical process we use copper ammonia complex to affect the solution of the cellulose.

Q. Why didn't you go forward with your cuprammonium project before the war?

A. There were too many technical difficulties encountered to give it the appearance of a chemical operation that could compete either with the Wolff process or with what we imagined the Dupont process to be.

Q. Now, did you do any work on this process during the war?

A. From 1943 on we picked up our studies on cuprammonium sheeting.

Q. How far did you carry them?

A. To the point of building a pilot plant and producing sufficient of material for preliminary packaging tests.

Q. About how much money did you spend in developing this film?

A. All told we have spent about $1,000,000.

Q. Did part of your development involve market studies?

A. Yes.

Q. Did you ever make and sell this cuprammonium film commercially?

9727 A. No, we never sold a pound of it. We made sample lots for testing but never sold any.

Q. Now, about when was it, Mr. Olsen, that you first heard that there might be a possibility of getting a license from Dupont for cellophane?

A. In the Fall of 1948.

Q. And where did you hear that?

A. We picked up rumors of it in several places as we were making our market studies, and it wasn't until October that I took it sufficiently seriously to ask permission of our Board to go visit the Dupont Company and find out if that were the case.

Q. Up to the time that you made this first visit had anyone from Dupont approached Olin?

A. No.

Q. And had any suggestion been directly made by Dupont that you come and ask for a license?

A. Definitely not.

Q. At that time were the relations between Dupont and Olin cordial, would you say?

A. No, they were never cordial during the—I think I can say safely—during the total time of my association with the company up to October 1948.

Q. Will you explain what you mean by that answer?

A. Well, we had had conflicting powder making proc-
9728 esses. We had been in strong competition in the field of ammunition and guns and there was a quite uneasy feeling about the ability to get along with Dupont in any way.

Q. In fact, had there not been controversies between Dupont and Olin with respect to the Equitable investment, for example?

A. I am not able to give any precise first-hand information about that other than that in the discussion that I had with our management the subject of the Dupont ownership in Equitable had come up at various times and was always the source of uneasiness and displeasure on the part of our own people.

Q. Did you have any difficulty persuading your Board to let you come down here and talk to Dupont?

A. Actually the particular Board Meeting that I presented the possible solution of our entry into the cellophane business by coming down to see the Dupont Company, it was greeted by all of my associates on the Board as one of those foolish things you would only expect from a research director; that if I did come here and try to put my nose in the door they would probably slam the door on said nose with considerable feeling of ridicule and some censure that I would bring up such a subject.

By the COURT:

Q. Who were your co-directors? Were they business men?

9729 A. Yes, sir. They are responsible for the conduct of the business and it has been reasonably successful.

I am only bringing that out to indicate that I was very conscious of the obstacles I met in proposing to my associates that we take this step because it was very directly incompatible with the previous feelings under which all of us lived for many years.

By Mr. GESELL:

Q. Had Dupont, to your knowledge, ever taken any part in the management or operations of the affairs of Equitable Powder?

A. Not to my knowledge.

Q. When you came here, Mr. Olsen, with whom did you conduct your negotiations?

A. I inquired through—I forget now—meeting somebody in the Dupont Building just where I should go to discuss cellophane licensing. I was finally led up to a room in which Mr. Henry Ford met me.

I explained my purpose and told him who I was, and he immediately began to discuss the features. He admitted that they were seeking to license someone in the cellophane field.

I asked him if he was willing to discuss it with me and he said he was, and proceeded to bring out a number of documents. I
9730 remember one of them consisted of a map of the United States which indicated an approximate concentration of cellophane usage in the different states.

To my mind that was rather confidential material, and I didn't want to be under false pretenses and asked Mr. Ford if he knew just who I was.

He said, "Yes, I know you are with Olin Industries."

"I wanted to be sure that you knew that because I thought that possibly you would not relish us as a competitor in this field."

He told me, as a matter of fact, he didn't have any choice in the matter, that he was going to discuss this with any competent people that had a legitimate reason for investigating the cellophane business.

Q. Did you understand that he was already at that time negotiating with others?

A. I asked him but he didn't give me any answer as to that. I tried to find out who was seeking licenses because rumors had it that there were several people interested in cellophane. But Mr. Ford didn't give me that information.

Q. Now, can you tell us in a general way the nature of the information that you elicited from this first conference?

A. Mr. Ford gave me a mimeographed document; as I recall it, that outlined the general features of cost of operation, the cost of a plant and the production that could be expected from an
9731 eight and a sixteen machine plant and the estimated return return if the operation was conducted the way they conducted it, the way Dupont conducted it.

Q. Did you ask questions?

A. I asked him a great many questions because it was apparent to me that the unfavorable reception which I had anticipated had not materialized, and I thought I would take the fullest proper advantage of the reception which I had.

Q. Did you get answers?

A. I got answers to all the questions I asked, yes.

Q. Will you tell us after that first meeting what the course of the negotiations was, just in your own way? Tell us what happened from that time in your negotiations down to the time you ended up taking a license?

A. It so happened we had a director's meeting just about two weeks after my visit to Wilmington and I prepared a report of my visit for the Board and that was discussed at the time of that meeting and I was authorized to continue the negotiations.

We brought technical people to Wilmington to study further aspects of the process. I think it was in December of that year:

in other words, three or four months later our company was invited to witness the operations at the Clinton plant and we flew a considerable portion of our Board of Directors to Clinton and were shown through the plant just as fully as we wanted to investigate it.

9732 We then asked for some document that would show the kind of contract that we would be expected to sign if we went into this, and a draft was given and we found a number of features that I don't remember what the difficulties were, but it was turned into the hands of our legal department and they discovered a number of things which I hadn't seen in the document, and it was a period of some months during which the negotiations were carried out and various concessions were made and adjustments of the contract.

Then we had a period of probably two or three months in which our activities were somewhat slowed down due to the death of our Vice President. We only had two Vice Presidents at that time and the second Vice President died, and he was an important stockholder of the company and there was considerable concern as to how we could handle the stock which he had which represented an immediate management responsibility.

Then we became uneasy about the financing because it was obvious that this was going to be quite a costly plant. It was nearly a full year, I think about October, yes, a full year before we actually got the contract in shape before we were willing to sign it.

Q. In that period did you make some counter-proposals to Dupont as to how you might enter the business other than by a license?

A. Yes. It became evident to us that there was going
9733 to be a period of perhaps three years in which our money would be tied up without earnings and a considerable business risk was involved, and we thought it would be a much happier solution if we could start in and buy one of Dupont's plants. We offered to buy the Clinton plant which we had seen, and it was the most modern of the Dupont plants, with a means of getting quickly into production. But that wasn't acceptable to the Dupont Company. We endeavored to argue them into that position but I was unsuccessful.

Q. Did you ask Dupont to give you any financial assistance?

A. We asked them if they would be willing to furnish part of the money to build this plant and they declined to consider that.

Q. Was it about this time, Mr. Olsen, that you became, while these negotiations were going on, that you became interested in the Acusta Paper Company?

A. Yes. The deal with Acusta Paper Company really stemmed from our studies of a desirable place in which to manufacture cellophane.

Q. Will you explain how that came about and what the Acusta property had to do with your entering into this business?

A. Part of the problem very quickly centered upon where you would build a cellophane plant in order to g[illegible]best serv-
9734 ice to the customers, and Dupont's engineers took us around several sites. We continued our independent investigations of sites.

During the course of that one of my associates brought the Acusta Paper Corporation to my attention, which is a company manufacturing cigarette paper at Pisgah Forest, North Carolina. The President and now Financial President and myself visited the Pisgah Forest plant and saw a very beautiful location where fortunately they had a tremendous supply of pure water. It became quickly apparent to us that the quality of water was going to play an important part in the purity of the cellophane we would make.

By the fact that the President of Acusta was an aging and an ailing man we were able to make a deal with him and purchased the entire property. We purchased that property for two reasons: One because in our judgment it formed a very satisfactory plant site on which to make cellophane, but I think primarily because it offered the economic advantage of being a going concern for the continued feeding of earnings into us and earnings of a sufficient amount to carry over the investment in the cellophane plant until the cellophane plant would get into profitable operation.

9735 Q. Was another factor the influence on the speed with which you could get into the business through this purchase?

A. Well, that was also a major element because there existed excess capacity in water purification. There was a power plant and a steam plant of quite large capacity, enough to run the cellophane plant as well. It so turned out that we were a tiny bit out in our calculations on that and have since had to add a boiler. But at least it was close enough that it constituted a sound engineering judgment to buy the plant and save possibly a year's time in getting into operation.

Q. What was Acusta's business?

A. The making of cigarette paper essentially. It does make some fine quality papers.

Q. Is it a large factor in the cigarette paper business?

A. Yes, it is quite a large factor in the cigarette paper production. I can't tell you how large because we don't know the capacity of the other competitor.

Q. Now, during this time the negotiations had been going on with Mr. Ford, is that right?

A. Yes.

Q. Did you have negotiations with any other du Pont official during this period before you signed the contract and if so whom?

A. Well, Mr. Gladding was in several of the discussions at the same time, and Mr. Ford's assistant, Mr. Fabs, was
9736 there. Those are the only three I can recall who were concerned with this discussion, other than getting technical information and operating information from the members of the cellophane division.

Q. During the course of these negotiations did you meet any of the officers of the company at any time?

A. I met Mr. Greenewalt himself.

Q. Did you negotiate with him?

A. Well, I took the opportunity when I saw Mr. Greenewalt to see if we couldn't better our position a little bit by suggesting that if we went into this cellophane business perhaps we might get licenses under their nylon patents as well, or under their polyethylene patents. I tried that unsuccessfully with Mr. Ford on almost every meeting I had had with him and it didn't seem to prove any more satisfactory when I saw Crawford Greenewalt.

Q. Well, now, when you signed up these contracts, about when was that?

A. I signed the contract I think in October, 1949.

Q. Now, had you made any agreement or reached any understanding of any kind with du Pont other than was in the four corners of that contract?

A. No, none whatsoever.

Q. At the time you were negotiating and at the time you signed or subsequently did du Pont ever make any representations to you as to whether or not they were going to license anyone
9737 else?

A. Yes, they had warned me specifically, as an answer to my direct questioning whether licenses would be given to anyone else, they warned me that they would be obliged to give licenses to any reputable company that approached them for a license and I suppose met ordinary business requirements.

Q. Mr. Olsen, have the terms of that contract been carried out?

A. Yes, indeed.

Q. How were they carried out?

A. Well, I can only say this, that they were carried out to my complete satisfaction and to the gratification of the officers of our

company. We have been amazed at the splendid talent that was assigned to the engineering work, to the construction work, and it has been a lesson to me in a fine operation, the manner in which they taught us the process and the cooperative manner in which they made available to us key personnel in the operating divisions.

Q. Well, tell me this: How did the estimates on capital requirements work out?

A. The plant estimates which had been given to us on the first day that I met Mr. Ford and which were repeatedly maintained at approximately that figure were about $18,500,000 for an eight-machine plant. Actually the figures are going to run somewhat perhaps slightly under $15 million.

9738 Now, of course, some of that is to be attributed to the fact that we had facilities at Acusta, such as roads, some sewers, and some other equipment in the way of power and water that did result in a lowering of the cost, although when I brought that up with the du Pont Engineering Company during negotiations they pointed out to me with what I believe was sound reasoning that sometimes it was cheaper to go to a site, a clean site, and start out than it was to try and build a plant on an existing plant site.

Q. When did your plant get operating?

A. In June of 1951.

Q. Now, where is that plant?

A. At Pisgah Forest, North Carolina, about thirty miles south of Asheville.

By the COURT:

Q. What was the method of financing the $15 million plant?

A. We chose to finance that largely through a loan from the Prudential Insurance Company.

Q. You had no assistance from any other person?

A. No, we had no assistance from anybody. We decided to take the risk ourselves completely.

By Mr. GESELL:

Q. Now, what is your approximate investment in cellophane facilities?

9739 A. Well, there was the $15 million that the plant cost us, plus part of another $25 million which the Acusta plant cost us. It is almost impossible to separate from the original investment in Acusta how much should be tacked onto the cellophane plant cost itself.

Q. How many machines do you have operating?

A. We have nine machines.

The COURT. How many were there at Richmond?

Mr. GESELL. I think that is a sixteen-machine plant.

The WITNESS. It started out as an eight-machine plant, but an agreement was adjusted to allow us to build a ninth machine mainly for experimental purposes, if we wanted to.

By Mr. GESELL:

Q. Is Olin selling cellophane to the trade generally?

A. Yes, indeed.

Q. Do you call on du Pont customers?

A. Yes—the answer is yes.

Q. Do you call on Sylvania customers?

A. Yes.

Q. Do you solicit all classes of trade?

A. All classes for which we make the specific types of cellophane. There are a few types of cellophane which we have not yet begun to manufacture.

Q. How does the quality of your cellophane compare
9740 with du Pont's quality?

A. It is indistinguishable.

Q. Were you able to secure adequate converter and distribution outlets when you started?

A. Yes—practically all of the converters were anxious to give us a trial, and they have welcomed our operations.

Q. Tell me this: Were you able to secure adequate raw materials?

A. Yes; there has been practically no difficulty in that field at all.

Q. What kind of a research organization do you have, Mr. Olsen?

A. We built up what I consider a very strong organization, probably a little too large for the present scale of operations but not too large in view of the anticipated expansion.

Q. Well, now, what has been the nature of your relations with du Pont after you reached the period specified in the contract for the construction and training of the personnel?

A. I don't think I understand your question.

Q. I say, what has been the nature of your relations with the du Pont organization since the time that the plant got under operation and the training period was completed?

A. Well, the curtain was pulled down and we no longer had access to sales information, to operating information, or
9741 anything else other than that we are entitled to data on research findings for a period of three or four years, as I remember.

Q. Now, can you tell us a little bit about the company's plans, Olin's plans, for developing its cellophane business?

A. Well, I just authorized yesterday the purchase of an additional plant site. That does not mean, however, that we will immediately start to build a cellophane plant, but it does mean that it is our intention to build a cellophane plant.

At the present time there is a softness in the cellophane market, and we are gathering all the data that we possibly can to let us estimate the probable extent of this soft period, and if and when there will be an additional demand for cellophane.

Q. Where is that plant going to be?

A. The probable location is in Indiana.

Q. How big a plant are you contemplating there?

A. Ten machines at the beginning, with a possibility of extending it to double that size if business warrants our so doing. At least we are going to carry out all the designs of the essential facilities so that it can be extended to a twenty machine plant.

Q. Have you been able to operate your business at a profit?

A. Yes.

Q. Your cellophane business?

9742 A. Since about November of 1951 we have been operating in the black.

Q. Does du Pont own any stock in Olin, any stock interest in Olin of any kind?

A. There may be odd individuals in the du Pont Company who own a few shares, but there is no du Pont Company ownership of Olin Industry stock.

Q. Do you know of any du Pont individuals who so own shares?

A. Well, this noontime a du Pont man told me he just bought a few shares. I didn't ask him how many. I did ask him the price he paid for it, and that was all.

Q. Can you tell me this, Mr. Olsen: Do you have any agreements or understandings with du Pont involving cellophane that in any way limit the quantity that you can manufacture?

A. Oh, no, there are no limitations.

Q. Do you have any agreements that affect the price that you can charge?

A. No. The only limitation I would say is that they agreed to build an additional plant for us, I think extending it to sixteen machines, and beyond that time they did not give any guarantee as to whether they would do other construction or even whether they would build us additional machines.

Q. Was there any limit placed on your right to go ahead and build more?

9743 A. None whatsoever.

Q. Do you have any agreement about customers?

A. No.

By the COURT:

Q. Who paid for the service of the engineers?

A. We paid for the services of the du Pont engineers and we paid a know-how and patent license fee. But that was a lump sum payment upon completion of performance at the plant.

By Mr. GESELL:

Q. Do you recall that Olin recently acquired some timber land?

A. Yes, we acquired a large tract of approximately a half million acres of timber land in the South.

Q. Do you intend through that acquisition to become a manufacturer of pulp?

A. We do. That was the purpose, to acquire the raw material that would allow us to make special high purity cellulose that would supply our cellophane needs.

Q. Does Olin make any other flexible packaging materials other than cellophane?

A. We make polyethylene sheeting.

Q. Do you have plans to expand in the field of flexible packaging materials beyond polyethylene and cellophane?

A. We are maintaining a very considerable research group and development group that is working on several other films
9744 that would in our judgment have application in the packaging field.

Q. Do you have any plans with respect to the manufacture of papers?

A. No specific plans other than I would like to leave the matter in this way, that since we will be converting trees into pure cellulose, undoubtedly some part of the trees that we harvest will not be of the grade to make cellophane grade pulp and we may choose to go into some form of other sheeting. Perhaps my enthusiasm for that was enhanced by sitting here this morning and learning what wonderful properties there were in glassine, which we of course could make in this southern property.

Mr. GESELL. That is all.

Cross-examination by Mr. MINOGUE:

Q. Mr. Olsen, when did you go with the Olin Corporation? What year?

A. May, 1929.

Q. And how did you start? What was your first capacity in 1929 with the company?

A. I was called director of research and development.

Q. Where were your personal headquarters?

A. At East Alton, Illinois.

Q. Did you have any connection with management that year? I mean, did you sit in conferences when management were
9745 deciding policies and so on?

A. My office was next door to the president, and I don't believe there were very many days in the week that I was not called into his office to discuss some phase of the company's business.

Q. Did he ever call you in during the year 1929 to discuss the relationships with the Wolff Company?

A. Yes. He mentioned that they had considered the Wolff process largely because our vice-president, Mr. Spencer Olin had gone over to Europe that year on his honeymoon and had visited the Wolff plant.

Q. That was in 1929 he told you that?

A. I think Spencer visited the plant possibly in 1928 or '29, but the matter came upon several occasions during '29 and subsequent dates too.

Q. Now, you say he told you they had considered the Wolff matter?

A. Yes.

Q. Did he intimate that they were not at that moment when he was talking to you considering it?

A. I am sorry, sir: I missed the point of the question.

Q. Your statement was that when you spoke with Mr. Olin he said to you that they had considered the Wolff matter?

A. Yes.

Q. Did you mean to imply that at that particular mo-
9746 ment they didn't have it under consideration?

A. I don't know that. The reason I say that is that my relationships in the cellulose field were well known to Mr. Olin, and I had just come at that time, and it was anticipated that we would start a cellulose research organization, which we did, and Mr. Olin hoped that I could take over this project.

Q. Well, then you must have been very close to it. Did he tell you, "We are now negotiating with Wolff on this matter," or "We have in previous months before I have spoken with you negotiated with Wolff in this matter?"

A. I can't recall with that degree of preciseness. I know it was a matter of discussion. Whether Mr. Olin said that at the particular moment they were negotiating, at another moment they had dropped it, I really don't know.

Q. Can you state with any degree of definiteness why negotiations in 1929 between Olin and Wolff were broken off?

A. I don't know that they were broken off. I think they were merely put into a state of quiescence. But I do not know that they were broken off.

Q. Do you know of any definite reason why they went into that state of quiescence?

A. Yes. The reason was that I had come with the company and was a cellulose chemist and could take up the studies.

Q. And how did your coming with the company affect the company's negotiations with Wolff?

9747 A. Well, simply that my coming with the company relieved Mr. John Olin of the responsibility of research directorship.

Q. You say that the reason the negotiations were broken off with Wolff was because of the economic crisis that we were in at that time, is that correct, sir?

A. No, I didn't say that. I said that subsequent to 1929 there was a slowing down of our cellulose studies because of the dropping off of business in general.

Q. But that dropping off of business had nothing to do with anything that may have occurred in the Wolff-Olin negotiations during 1929?

A. I don't know of any such relationship.

Q. You have no knowledge of it?

A. I have no knowledge of that.

Q. Now, then, let's begin in 1930. You started your cellulose research, as you have told us and you continued that pretty constantly, did you not, sir, up through into the war period?

A. That is right.

Q. And when did you first become interested in regenerated cellulose in the form of cellophane?

A. We activated that interest in 1934 when Dr. Weigand, from Wolff visited us again.

Q. That interest then was fairly constant from that point on?

9748 A. 1934, 1935, there was considerable interest, which was followed by my visit to Germany in '36.

Q. And this was all with the Viscose process?

A. This was viscose process at that time with only the glimmerings, the research dreamings of the possibility of cuprammonium operation.

Q. How close did you come to really getting into the manufacture of viscose regenerated cellulose during that period?

A. Well, we didn't come close enough even to put up a pilot plant on the viscose operation.

Q. Why not, sir?

A. Because my studies had indicated to me that this process was not competitive.

Q. With what?

A. With cellophane as made in this country.

Q. Did you ever try to get a license under the process for cellophane as it was made in this country?

A. No.

Q. Why not, sir?

A. Because we had no confidence in our ability to do so. There was no friendly interest with the du Pont Company. As a matter of fact, I don't think it ever would have occurred to us to do so.

Q. Well, you said there was no friendly interest in 1949 or '48 when you first approached them, too?

9749 A. That is right.

Q. And you went to them that time?

A. I went to them that time with the distinct disapproval of many of my associates.

Q. Now, do I understand you correctly, Mr. Olsen, that your first approach to the du Pont Company relative to the negotiations that finally culminated in a license was in 1948?

A. Yes, in October, 1948.

Q. Did you know at that time whether or not there was a complaint pending in the Federal Court for the District of Delaware or in any other District Court charging du Pont with monopolization of the cellophane industry?

A. We knew that possibly a month or two before I visited Mr. Ford.

Q. Now, during the course of these negotiations between Olin and du Pont was there a disclosure ever made relative to the principal objective which du Pont desired to accomplish through this license? Why did they want to make this license?

A. Because they were hindered from expansion of the cellophane business by the threat of this suit. That was my understanding of the reason.

9750 Mr. MINUCUS. I ask that this document be marked as Exhibit 568 for Identification.

(A letter draft of agreement with Olin was marked, "Government Exhibit No. 568 for Identification.")

Do you care to look at this, sir?

Mr. GESELL. No.

By Mr. MINUCUS:

Q. This is a document taken from the Dupont Company files, Mr. Olsen, that appears to have originated with the Olin Company. There is a preface on it discussing a following draft of an agreement presented to Olin by E. I. du Pont. Have you ever seen that before, to the best of your recollection? The first page of the draft is the final page of that exhibit. If you have not seen that exhibit have you received any drafts of the Dupont Company with that wording on the first page?

A. I remember discussions of this kind. I am familiar with the subject matter. I think I saw this document. I am not positive precisely that that wording is the one I saw.

Q. Perhaps I could resolve this through a question. Do you recall, in the course of the negotiations, receiving any drafts for a license from the Dupont Company with the following language or similar language therein:

"Whereas, licensee is interested in obtaining from Dupont and Dupont is willing to grant to licensee the rights here-
9751 inafter referred to relative to cellophane; to the end that licensee may, by entering the field of cellophane manufacture, help to meet the market requirements for additional cellophane and become a substantial competitor in the cellophane field; and whereas, Dupont desire to lend all possible assistance to the licensee in becoming a substantial competitor so that the hazard of Dupont being judged to have a monopoly in the United States cellophane field is reduced."

Have you seen that language or language to that effect in some of the drafts you received from the Dupont Company?

A. I think that was substantially in that form, yes. I don't remember whether that is part of the final contract or not. I don't recall that.

Mr. MIXICUS. I request that this document be marked as Government Exhibit 566 for Identification.

(Market Report dated December 15, 1948, was marked, "Government Exhibit No. 566 for Identification.")

By Mr. MIXICUS:

Q. I show you Government Exhibit 566 for Identification which purports to be a market report in support of Olin's entry into the cellophane business. It is dated December 15, and ask you is your signature subscribed thereto?

A. Yes, it is.

Q. Do you recognize that report, Mr. Olsen?

9752 A. I recognize the report and recognize my signature.

Q. Thank you, sir.

A. That is December 1948, as I remember.

Q. December 1948. That is correct.

A. That is three months after the negotiations began.

Q. Do the statements contained in Government Exhibit 566 for Identification present a true and accurate reflection of your knowledge at the time the report was written?

A. Yes, to the best of my knowledge that is the material, as I recall it, that was presented to our Board as a means of educating them as to the nature of the negotiations with the Dupont Company.

Q. Was it in large degree based on information that you had received in written and oral form from the Dupont Company?

A. Only to the extent that for a short length of time of some three months they had permitted us to get Dupont information. We had made many previous studies of the film business and I would expect that much of this report could be traced partly to that earlier knowledge and only to some degree of newer information that Dupont had given us.

Q. In addition to cellophane which is, of course, the principal subject matter of the present suit, did Dupont also offer to licet a you in the field of cellulosic bands which is another subject matter involved in this suit?

A. The matter was discussed on one or two occasions and
9753 it was indicated that if we wanted to go into the bands business that we could make a separate deal with them. We felt we'd better take one bite at a time and very little discussion was made, other than I do think in all fairness to the negotiations, I think we thought it would be nice if we could work that in without any additional payment as a trading basis but that didn't work.

Q. In the course of these negotiations, however, were any of the processes of the Dupont Co. for the manufacture of cellulosic sponges, which is not a subject matter of this suit, offered to you?

A. No.

Q. Have you ever visited the cellophane plant at Fredericksburg, Virginia, which is operated by the Sylvania Corporation of the American Viscose Company?

A. I have.

Q. What is the occasion upon which you made that visit to Sylvania?

A. It was at the invitation of Dr. Reichel, the President of the parent company.

Q. What was the date of that, Mr. Olsen?

A. I don't remember.

Q. Would it refresh your recollection if I mentioned the date in here about April 1949?

A. I am sorry, Mr. Minicus. There were so many things
9754 happening that I need a little more help than that to place it.

I can give you this state of my own recollection of it, that it was after we had started discussions with the Dupont Company and Mr. Reichel knew about those, in fact, I told him about them in a meeting I chanced to have with him. We met him in the Waldorf at some dinner and I told him we were negotiating with Dupont, and he invited me to visit their plant. I visited him at Philadelphia and then went down to the plant.

Q. Did they take you completely through the plant?

A. As far as I know, they took me through enough to see what I believed to be the total operation.

Q. They didn't tell you that anything there was secret and obviously keep you away from certain parts of the properties because it was a secret process?

A. That wasn't mentioned and I didn't ask to see anything that they didn't wish to show me.

Q. Did you disclose the fact to Dupont that you had had this visit to the——

A. Yes, I mentioned that to Mr. Ford. In fact, I think I told him before I went down that I was going, if I remember correctly.

Q. Now, Mr. Olsen, a Dupont official in the Court here has testified as a witness in Court that the Dupont Company consid-
9755 ered Dupont's interest in the Equitable Powder Company to be a joke. What percentage of the Equitable Powder Company does Dupont own?

A. 49 percent.

* * * * *

9771 Q. Now, directing your attention to Government Exhibit 556 for Identification and to the information contained in that document at the top of page 5 down to the heading "Economics", I ask you whether or not that information is the information which you stated on your cross-examination was of a type partly obtained from du Pont and partly obtained from others as a result of your market surveys?

A. Yes, partly from du Pont, partly from others, because we obtained very little if any information about the characteristics of some of these vinyl polymers and other films.

Q. Now, you stated that was made in December of '48. Has your experience in the sale and development of cellophane since that time shown those statements in your judgment to be correct or false?

A. There is one statement in here that I think could be a little bit on the ambitious side.

By the Court:

Q. What portions are you reading?

A. Particularly this portion: "According to du Pont cellophane is considered the only all purpose film, and any product to be truly competitive with cellophane must have the following attributes: low cost, transparency, operate with a high efficiency on mechanical equipment and print well both as to speed and appearance."

The thing that is, I say, a little on the enthusiastic
9772 side is the statement of it being an all purpose film. We have found out in the last few months that we met with more than serious competition with our cellophane. However, I

do want to mention, especially after listening this morning to the discussion

Q. On glassine?

A. On glassine; that the gentleman this morning made the same distinction that we did. He was careful not to refer to film as not including glassine, and to us a film has always, rightly or wrongly, just our method of conversation, has referred to these plastic films or homogeneous films, not the paper type.

By Mr. GESELL:

Q. Did you mean by those statements or any other in that exhibit to indicate that du Pont had told you or that your market surveys had disclosed that cellophane didn't compete with glassine or wax paper?

A. Oh, we were told that it did, that it was in competition with glassine and wax paper, because the whole subject of the white bread wrapper was a very, very live one many times.

9773 Q. Now, with respect to your visit to the Sylvania plant, did Dupont do anything to arrange that visit for you?

A. Nothing whatsoever. Dr. Reichel was insistent that I go down to see it. I was very much puzzled why he wanted me. I asked him that night, "Why do you wish me to go?"

Q. What did he say?

A. He said, "I want you to see how complex this cellophane operation is and see how much we have done in the way of development because we don't want you to come into the business."

Q. Did you disclose any of the information you obtained on that visit to Dupont?

A. No. I didn't want Dupont to think that we were having peculiar dealings with Reichel without letting them know, and likewise I wanted Reichel to know. I had told Reichel all of our plans in general terms, because if we were going to go into the business we would be in as a competitor and he would know it sooner or later.

Q. Did Dupont ever try to discourage you from going into this business?

A. No.

Q. Did you ever disclose any of the information you obtained on that visit to Dupont?

A. No, none whatsoever.

Q. Now, I direct your attention to Government Exhibit

9774 508 for identification, the last page which Mr. Minieus read into the record in the form of a question. I want to ask you, is that a draft prepared by Olin Industries, Incorporated, or a draft prepared by Dupont on that particular page that he read?

A. I don't know. They don't seem to me to fit together. The

first two pages, the preface, look very much like material that our lawyer had brought up as subjects for discussion. I am not certain of that.

Q. Will you direct your attention to the last page? Do you note it bears the caption "Olin Industries, Inc." in the upper left-hand corner?

A. Yes, draft of March 15, 1949.

Q. Can you state now from your own knowledge that that sheet was prepared by somebody in Dupont?

A. I don't know.

Q. Do you know who it was prepared by?

A. No.

Q. With reference to this contract, did you contact the Department of Justice before you entered into it, Mr. Olsen?

A. The head of our legal department, Mr. Casteel, visited Mr. Minicus in the late summer, I think, of 1949, and asked you to look over the contract to see whether there was anything that in your judgment would cause us to be involved in this suit which we understood might come about.

9775 Q. Were changes made in the contract as a result of suggestions of the Department of Justice?

A. Some very helpful suggestions were made by Mr. Minicus, and those changes were incorporated by agreement of the Dupont lawyers.

Mr. Minicus. Your Honor, this is entirely hearsay and not in accord with any of my knowledge. I think we should have a witness testify to this that was there.

The Court. You mean there was never a discussion with you?

Mr. Minicus. I have had a discussion at luncheon with Mr. Casteel at which there was no vital discussion of the contract and no suggestions made on my part.

Mr. Casteel told me that they were considering going into the industry and said, "How do you think the Department would feel about the entry into the industry of another organization?"

I said, "Apparently the Government is seeking additional competition here. If that competition is entirely independent and makes a vigorous competitor I don't see how the Government could possibly have any objection."

That is the sum and substance of my conversation with Mr. Casteel or any other representative of the Olin Company in this matter.

9776 By Mr. Gesell:

Q. Did you not have an attorney named Mr. Engelhardt?

A. Yes.

Q. Did he not go to the Department of Justice on your behalf with respect to these matters?

A. It is my understanding from Mr. Casteel's report to me that he did, but the nature of any discussions I don't know.

I do want to remind Mr. Minicus in this repect, that Mr. Casteel reported to me that he had definitely brought up to you the feature of the Olin-Dupont ownership in the Equitable Powder Company so that you could be fully aware of that so that there was no difficulty that we were going to get in on that account.

The COURT. Do you have some contribution to make?

Mr. MINICUS. Yes, I must again deny that statement. I have absolutely no recollection of any representative ever saying to me anything about the Equitable Powder Company interest jointly held by Olin and Dupont.

The first time that I ever heard of it was one of my associates found it in a footnote of a magazine article and brought it to my attention. I think if he can recall the situation we can get him to testify to that.

The COURT. I think you have sufficiently stated your position in the record. Proceed, Mr. Gesell.

9777 By Mr. GESELL:

Q. What was the origin of the suggestions, Mr. Olsen, contained in Government Exhibit 568 for Identification which I show you? Those were Olin's suggestions, were they not?

A. As items we wanted to have changed in the contract.

Q. Who suggested those items to you?

A. These were suggested by our attorney, Mr. Casteel.

Q. Was that before or after his visit to Washington?

A. I don't know.

Mr. GESELL. I haven't any further questions.

The COURT. Any questions, Mr. Minicus?

Mr. MINICUS. Yes, sir.

9778 Re-cross-examination by Mr. MINICUS:

Q. Let us get one thing straight first, Mr. Olsen. Were you personally present at any meeting I ever had with any representatives of the Olin organization?

A. No, I just met you this week.

Q. And everything you have reported in this court this afternoon is entirely hearsay?

A. No, it is what Mr. Casteel reported to our board. If that is hearsay, then it is hearsay.

Q. Now, do you have any recollection that the du Pont Company ever offered to buy out Olin's interest in the Equitable Powder Company? Did you ever hear that discussed, any offers made by du Pont to buy Olin's interest in Equitable?

A. No I never heard of that.

Q. Now, Mr. Gesell questioned you about this document, and this was taken from the du Pont files. Would you read the first paragraph of that document, sir?

A. "The following draft of agreement is in the form presented to Olin Industries, Inc. by E. I. du Pont de Nemours and Company with certain recommended changes."

Q. Does that say that the following draft came from the du Pont Company?

Mr. GESELL. Now, may I suggest that the witness read the next sentence?

9779 The COURT. Yes, read the next sentence.

The WITNESS. "All recommended changes have been inserted in this draft and are designated by being indicated with parallel lines."

By Mr. MINICUS:

Q. Turn, please, to the language that we have discussed concerning the hazard of du Pont being adjudged to have a monopoly. Are there any parallel lines around that?

A. It looks to me to be a parallel line here.

Mr. GESELL. Four.

Q. Do you think that Olin introduced that language into the agreement?

A. These were one of the recommended changes, but whether we made the recommendation for the change or whether it resulted as a discussion with du Pont, I don't know.

Q. Did you ever receive any draft, to the best of your recollection, that contained that language?

A. I don't remember that, Mr. Minicus. These drafts went through so many variations and that particular sentence would be the type that would not concern me since it had no technical connotations.

Q. Did du Pont ever disclose to you that its principal objective in licensing another manufacturer in this field was to avoid the hazard of being adjudged a monopolist? Did they?

9780 A. I don't know where that statement came from, whether du Pont suggested it or how it came into the picture, but that is the statement on the first page of the draft, is it not?

Q. You have that statement in your own report, don't you, sir?

A. In the same general form. I think it was the case. I would like to see my report to see it.

Q. Certainly, sir.

Mr. GESELL. Just a minute. You are calling his attention to the full first paragraph of Exhibit G. X. 566. Your Honor, you like to examine?

The COURT. Yes.

Mr. GESELL. It doesn't say anything about a principal objective being to avoid such a hazard at all, your Honor.

By Mr. MINICUS:

Q. Is that statement concerning or similar to the language we found in the draft found in this report?

A. It seems to be. It is evidently my notation to present to our company what my interpretation of this difficulty is. Mr. Minicus, you should remember that we were tremendously surprised at being able to have the chance to get a license under this cellophane operation that we had been studying for so many years. That needed explanation to our group.

9781 Q. Is that the explanation you got from the du Pont Company?

A. I don't know whether it was stated in those words or whether I interpreted their statements as indicating that. I wrote that in that as my presentation to our people.

Q. All I am trying to find out, Mr. Olsen, is this: what was the genesis of this idea that du Pont was willing to license Olin to escape the hazard of being adjudged a monopolist? Where did it come from—out of your mind or the du Pont Company and the information you got there?

A. I don't know whether that was an interpretation I made of the things which they told me as my explanation to our board of why we were being permitted to possibly secure a license.

Q. You might have made something like that up to tell your board?

A. I might have drawn that as the most logical conclusion I could think of from the data I had received.

Q. Do you think possibly Mr. Casteel followed that procedure too when he told the board that I had recommended changes in this agreement?

A. I don't know what Mr. Casteel based his statement on, but he made those statements to us.

Q. Just like you made the statement here, that du Pont was licensing you to escape the hazard of being adjudged a

9782 monopolist in this suit?

A. That was my interpretation of this situation.

Q. Interpretation based on what?

A. On the statements that were available to us from the trade, some newspaper statement, and undoubtedly conversations in Wilmington.

Q. Did anybody in Wilmington ever tell you that the principal purpose in licensing you was to escape that hazard?

A. As I remembered, the main reason that they gave me when that was discussed was that they were prevented from expanding their facilities by this impending suit.

Q. Why didn't you report that to your board instead of reporting to your board that they were desirous of escaping——

Mr. GESELL. He did report that right in that sentence, and I think that is an objectionable question.

The COURT. Objection sustained.

By Mr. MINICUS:

Q. You reported two things to the board, did you: one, that they were desirous of expanding which they couldn't do and wanted to get somebody else to do it, and the other that they were desirous of escaping the hazard of being adjudged a monopolist.

Now, where did those two threads of thought come from?

9783 A. I don't know precisely on what these were based. All I can say is that at that time my best judgment was that this was the suitable explanation of the facts as I had heard them.

Q. From whom?

The COURT. That is the fourth time the witness has given you the answer to the same question. I am only going to allow you to ask it once more.

Mr. MINICUS. I will ask no further questions.

The COURT. Very well.

Mr. GESELL. No further questions.

The COURT. After adjournment I want to see counsel. Adjourn court until tomorrow morning at 10:00 o'clock.

(At this point the trial was adjourned to 10:00 o'clock a. m., Friday, April 25, 1952.)

* * * * *

9803 *Colloquy*

The COURT. My interest is not primarily with seeing to it that the defendant can plan its schedules: I think there is a duty to the Court so it can arrange its schedules. Does it mean for the rest of this year and perhaps part of next year I am going to be out of circulation for other litigants?

Mr. MINICUS. I think my assurance covers that. The only thing is I don't feel there is any necessity for binding us beyond reproof. There are, as I say, two very important witnesses to come. I have no idea what they are going to testify about. As I say, I don't believe——

The COURT. Would you be in a position when you commence your rebuttal to announce what your position is?

Mr. MINICUS. Most certainly, sir.

Mr. GESELL. Your Honor, I must know about it before then. If there is in rebuttal to be an attack on any of these patents we,

I think, are entitled to know well in advance what the prior art is, what the patents are, what the specific claims under attack are, what the alleged grounds of invalidity are.

I might say to your Honor the day this case was
9804 filed many, many months ago we started by pre-trial to find out whether the Government was or was not attacking the validity. For a period of many, many months they squirmed and dodged that issue. Order after order has been entered trying to pin them down. They never get pinned down and we cannot let this record, your Honor, be indefinite on the issue as to whether or not validity is challenged, and that is my only interest. I want it clear I have to be notified, it seems to me, well in advance if there is any attack.

Mr. MINICUS. I have attempted to make it clear throughout, your Honor, that patent validity is not an offensive weapon of the Government. We are only holding back on the possibility of being forced to it as a matter of defense. That has been our position throughout. I said I don't know whether the defense would raise any issues that would necessitate recourse to a patent validity suit. I don't conceive or perceive that they have so far. I don't think they will, but I don't want to be bound so that I can't have recourse to a perfectly valid position should the occasion arise.

I again reiterate that as of this moment the Government has no intention of attacking the validity on the developments so far. I don't believe such a contingency is going to arise. We have made no preparation to attack the validity of the patents,
but I can't foresee what is going to happen in the future.
9805 There is even the possibility that if we bind ourselves to that extent, your Honor, the defendant may put in something on sur rebuttal that will take us completely by surprise so that it will be necessary to have recourse to a patent validity argument. I don't foresee that, but I don't see why we should have one of our possibilities irretrievably foreclosed to us. What is the point? We have done no preparation in this regard, we don't want to have recourse to it, but I am not willingly going to give up a perfectly valid right of litigation that we should be able to possess.

The COURT. Well, by next Friday, which will be May 2nd, you will have heard all of the defendant's witnesses. Why shouldn't you be in a position on that day to determine whether you are required to attack validity?

Mr. MINICUS. As far as our rebuttal is concerned I undoubtedly will be, but then what I am going to do about their sur rebuttal?

The COURT. How are they going to raise the question of validity of their own patents on sur rebuttal? It will not be an issue in the case. It would not be relevant to any issue.

Mr. MINICUS. Isn't it possible, your Honor, in our rebuttal they could interject some defense that would make it necessary for us to have recourse to that?

Mr. GESELL. Let us not have any doubt about our defense, if your Honor please. From the outset of this case we informed the Court and we have said in our trial briefs and
9806 we have repeatedly on the record that we rely on our patents and rely on the validity of our patents, and we have relied on them from the start. There is no question that that is part of our position and has been from the beginning. If they are not going to challenge the validity certainly no issue of validity can arise on our rebuttal.

The COURT: I don't see how it could.

Mr. MINICUS. I don't see it either, your Honor, but I don't see why we should at this stage disenfranchise ourselves from having recourse to a perfectly valid litigious issue when we don't know what is ahead of us. Why should we be required to say we are not going to do thus——

The COURT. I think you should know by next Friday whether you are going to raise the issue. After that if the defendant would take any position which would call into the issue any new matter which is not already in the case which you think would necessitate you to go into the question of validity, that right will be reserved to you.

Mr. MINICUS. That is all we ask, your Honor. Thank you.

The COURT. But by next Friday when we close I want a statement on the record as to whether your rebuttal is going to contain any attack on validity.

Mr. MINICUS. We will be perfectly happy to give you that, sir.

9807 Mr. GESELL. As of the present time, your Honor, there is no attack on validity?

The COURT. That is correct. That is my understanding.

After next Friday you said you want a period of preparation for your rebuttal, Mr. Minicus?

Mr. MINICUS. We would like to have two full weeks, your Honor. We do have to get the documents together, and then there is the matter of reproducing them.

The COURT. So that we can start on the 21st of May.

Mr. MINICUS. Yes, sir, and I might also say that for the convenience of the Court in this matter that I firmly believe, as best I can estimate it at this time, that we will be finished before the end of May.

(There was a discussion off the record.)

9820 WEDNESDAY, APRIL 30, 1952, 10:00 O'CLOCK, A. M., E. D. S. T.

Present: As before noted.

LEONARD A. YERKES, called as a witness on behalf of the defendant, was duly sworn and testified as follows:

Mr. GESELL. If your Honor please, Mr. Yerkes is a Director of Dupont. He retired in 1945. From 1923 to 1945 he was the executive chiefly responsible for the development of the Dupont cellophane business and policies, first as President of Dupont Cellophane Company until its merger with Dupont in 1936 and thereafter as General Manager of the Rayon Department. His testimony will cover many of the major issues in the case of which he has testimonial knowledge.

Direct examination by Mr. GESELL:

Q. Mr. Yerkes, will you state your full name for the record, please?

A. Leonard Augustus Yerkes.

Q. How old are you, Mr. Yerkes?

A. I will be 72 in September.

Q. What is your present connection with Dupont?

A. Only as a Director. I have no other connection with them except as a Director of the company.

Q. How long have you been a Director of the company,
9821 Mr. Yerkes?

A. Either since 1924 or 1925. I think 1925. I am not entirely clear as to the date but that is approximately correct.

Q. When did you retire as General Manager of the Rayon Department?

A. In 1945, October.

Q. You now live in Florida, do you not?

A. I do.

Q. Have you had any connection with cellophane since your retirement?

A. I have not.

Q. You were President and Director of Dupont Cellophane Company from June 1923 to October 1936 the record shows; is that correct?

A. That is correct.

Q. And you were General Manager of Rayon from 1936 until you retired, were you not?

A. That is right.

Q. When were you first employed by the Dupont Company, Mr. Yerkes?

A. Either in 1917 or 1918. My recollection is not entirely clear. I think it was in 1917.

Q. What had been your business experience immediately before you were employed by the company?

9822 A. I had been with the Joseph Bancroft & Sons Company here in Wilmington ever since I left College in 1902, fifteen years.

Q. What was the nature of their business?

A. They were dyers and finishers of cotton piece goods and also other cotton and rayon goods.

Q. What kind of work did you do when you first went to work for the company in 1917?

A. In 1917 for the Dupont Company?

Q. For the Dupont Company.

A. I was first employed in the Development Department.

Q. How long did you stay in the Development Department?

A. I was in the Development Department from 1917 until the rayon plant and business was started in Buffalo. It, to the best of my recollection, was in 1920. I think we started to build the plant in 1920. I went to Buffalo in 1920.

Q. What did you have to do with the company's rayon business? Were you President of the Rayon Company?

A. I was.

Q. You stayed President of it until its merger with Dupont in 1936, did you not?

A. I did.

Q. When did you first become connected with Dupont's cellophane activities?

A. I first really became connected when the contract
9823 was signed with the French, which was signed by the parent company and the Cellophane Company was formed, and I immediately was made head of the Cellophane Company.

9824 Q. Did you have anything to do with the negotiation of the agreement with the French?

A. Practically nothing.

Q. You were the first president of the Cellophane Company?

A. Yes.

Q. Well, when you started out in that job, what did you know about making cellophane?

A. Well, from a practical standpoint I knew really nothing. I knew that cellophane was made from viscose and I knew it went through a long series of machines, but that was the extent of my knowledge.

Q. Had you visited the French plant prior to becoming president or about that time?

A. Yes, I went through the plant at Bezon. Just whether it was before the contract was signed or whether it was after, I can't remember, but I had been through the Bezon plant, yes.

Q. What steps did you take to get the cellophane business going when the company was set up and you became its first president? What had to be done?

A. Well, the first thing that had to be done was the building of the plant, and that necessitated the engineering department representative going to France and getting all the details of equipment.

9825 At the same time, or perhaps a little later time, the technical and practical men went to France and got the operating information.

The du Pont Engineering Company built the plant in Buffalo, and then the men had accumulated some knowledge of the process, came back, and then the French sent over several representatives to help us start the plant, men who were practical, and men who were also technical, men who knew how to make viscose as well as men who knew how to run the machines.

Q. Where did the du Pont Cellophane Company first have its executive offices?

A. In Buffalo.

Q. They were later moved to New York, were they not?

A. They were.

Q. About when was that?

A. It was before the crash, I know. I think it was late '28. That is approximately correct.

Q. How long did the offices stay in New York?

A. We moved back to Wilmington in '37.

Q. How frequently did the board of directors of the du Pont Cellophane Company meet, Mr. Yerkes?

A. They met regularly once a month.

Q. Where did those meetings take place?

A. Well, they took place in various places. I would say the great majority of them were in New York. Once in a while we would have a meeting in one of the plants but practi-

9826 cally all the meetings were in New York.

Q. Now, can you tell us who Mr. Henry Blum was?

A. Mr. Blum is dead, and if he heard you call him "Bloom" he would not like it. There were two Blum brothers, Albert and Henry. Albert was the elder. Henry was the younger. They and their family controlled the United Piece Dye Works, which had a plant in Lodi, New Jersey, for the finishing and printing of mostly silk goods, very similar to the Bancroft Company only they specialized in silk where we specialized in cotton.

Q. Are both of the Blum Brothers dead?

A. They are.

Q. How long had you known them at the time the company started in 1923, Mr. Yerkes?

A. Well, of course, I can't give you the exact date, but I went to the Bancroft Company in 1902 and both the United Piece Dye Works and the Bancroft Company being in the same business, or relatively in the same business, I must have first known them, I would guess, about 1910.

Q. What was their connection with the French La Cellophane group in France?

A. Well, previous to the formation of the Cellophane Company, I don't think they had any direct connection with La Cellophane. Their connection was principally with the Comptoir and
9827 the Gillet interests in the dyeing and finishing business. That was their real connection.

Q. Did the Comptoir or Gillet interests have any interest in United Piece Dye Works?

Q. Did the Comptoir or Gillet interests have any interest in United Piece Dye Works?

A. I cannot state that positively, but it has always been my definite impression that Mr. Gillet had an interest in the United Piece Dye Works because I do know that in later days he was quite active when the United Piece Dye Works got into difficulties in their organization and one thing and another, I know Mr. Gillet was over here quite a lot in very active consultation with the Blum Brothers, and I have always understood that he did have an interest in the United Piece Dye Works but not a controlling interest.

Q. Who was Mr. Paskus?

A. Mr. Paskus was a lawyer, I am sure, for the United Piece Dye Works in this country, and he also was the lawyer for Mr. Gillet and the French interests in this country. The firm was Proskauer, Paskus, and I have forgotten——

Q. He was a partner of Mr. Proskauer with offices in New York, was he not?

A. Yes.

Q. To what extent have these three gentlemen we have been discussing, the two Mr. Blums and Mr. Paskus, attend meetings of the Cellophane board of directors?

A. They attended to the best of my knowledge practically every meeting.

9828 Q. Now, what sort of matters came before the Board in relation to the company's operations?

A. You are speaking now of cellophane only?

Q. Yes, the cellophane board.

A. I can only answer that in a general way: that all matters of importance came before the board. The monthly reports were written to the board and they were discussed at meetings as well as any other matters any other members of the board wanted to

bring out. They were meetings that lasted two or three hours and it was a new business and the whole board was interested in what was going on, and matters generally of importance were pretty carefully discussed.

Q. To what extent did the French representatives we have been discussing participate in those conferences when the board met?

A. I can only answer that this way: If you had known the Blum brothers you would know that they were very active. They had always questions to ask and they were very active members of the Board.

Q. Do you recall any occasion when there was a disagreement of any major consequence within the board between the du Pont representatives and the French representatives as to how the company should operate?

A. No.

Q. Did the du Pont Cellophane Company, Mr. Yerkes,
9829 operate as a separate and distinct corporation from du Pont?

A. In the beginning, yes, it did.

Q. Did it maintain separate books and records?

A. Yes.

Q. Would du Pont have gone into the cellophane business, Mr. Yerkes, without the French information, French technology?

A. No.

Q. Why do you say that?

A. Because they had no knowledge of how to go in the cellophane business.

Q. Was information relating to the commercial manufacture of cellophane available at that time from any other source, to your knowledge?

A. It wasn't, to my knowledge.

Q. Can you tell us what steps the du Pont Cellophane Company took to keep the information it received from the French relating to cellophane secret and confidential?

A. The French were always very insistent that—not only in cellophane but in rayon also—that we build fences around our plant, that we have guards around it, that we make everybody have passes and that we do everything in our power to keep the process secret and to keep people out who had no business in the plant and so forth and so forth.

9830 Q. You say they were insistent. Did you in fact do that?

A. Yes, we did. I remember when our first representatives went there to see the Beson plant they inspected these men with a fine tooth comb to be sure that they were the actual men that we had sent over. They were so careful to keep anybody out of

the plant that was not the proper representative of the Dupont Company.

Q. At the time Dupont entered into the cellophane business do you know whether any other American interest was negotiating with the French for the cellophane rights?

A. Not to my knowledge.

Q. What have you got to say, Mr. Yerkes, about the charge that is made by the Antitrust Division in this case that you or the Dupont Company induced the French to breach their contract with a concern known as Birn & Wachenheim?

A. Well, we certainly did not induce or try to induce the French to breach their contract. We realized at some stage of the proceedings that Birn & Wachenheim were the agents in this country for the sale of cellophane and, to the best of my recollection, La Cellophane simply said to us, "Well, Birn & Wachenheim are our agents. When this contract is signed we will turn over the agency to you until the plant is built, and when the plant is built obviously you will have the sole American rights."

9831 But we made no direct effort to make them breach any contract. I don't know myself what contract, if any, they had with Birn & Wachenheim. They were their selling agents and that was as far as my knowledge goes.

Q. At the time that the contracts were signed with the French and the Dupont Cellophane Company had made its arrangements with the French for entering into the cellophane business was there any other understanding or agreement with the French other than set forth in the formal written contracts?

A. None whatever, to the best of my knowledge.

Q. Well, would you have known of any such agreement if there was, Mr. Yerkes?

A. I am sure I would have.

Q. Why do you say that?

A. Because if there was anything without—outside of the contract it would have appeared somewhere along the line, and I am sure that Mr. Spruance was the kind of a person who would certainly not have any deal other than what was set forth in the contract.

Q. You never heard of any such deal?

A. No.

Q. The Antitrust Division suggests that there was a secret deal concealed in the word "etc." that appears in Government Exhibit 1001, being the basic contract between Dupont and Arcya

9832 Trading, and I would like to read you the portion of the contract in question.

The contract states that stock will be issued to the French and says that the French shall transfer or cause to be transferred to

said company all of its and Societe La Cellophane's right, title and interest in and to any trademarks, patents; patent rights, including all pending patent and future applications, processes, data, knowledge, information, etcetera, governing, effecting, or in any way pertaining to the manufacture and sale of cellophane in North and Central America, in consideration of which payment and transfer there shall be issued to the party of the second part, that is the French, 48,000 shares of stock.

My question is this: Did those words "etc." comprehend some additional consideration or understanding other than the contract itself sets forth?

A. Absolutely not.

Q. For what period of time did you keep the technical information received from the French secret, Mr. Yerkes?

A. Well, that is a pretty broad question. In effect we kept it secret for years. Certainly in the very beginning it was ultra secret. I can't tell you exactly how many years. You asked me what period of time. It certainly went on for a long time, the endeavor to keep the process secret.

Q. Do you recall an occasion around 1930 when Dupont learned that French information had gotten to Sidac and that
9833 Sidac was setting up a company in this country known as Sylvania?

A. Do I remember it?

Q. Yes.

A. Yes.

Q. Can you tell us what some of the different suggestions were within the Dupont organization as to how that situation should be dealt with?

A. Well, as I remember it, there were three suggestions made; there may have been more, but I can recollect three methods by which we were to be compensated for this breach of contract which the French admitted. Firstly, cash; second, stock in the—in Sidac or stock in Sylvania; and the third suggestion which was the one finally approved of having La Cellophane grant us export rights.

Q. Which plan did you favor of those three, Mr. Yerkes, in the discussion?

A. I favored the latter, the rights to export.

Q. Were these matters discussed within the Board of the Dupont Cellophane Company at the time?

A. They were.

Q. Do you recall that Mr. May was sent abroad at a later date to negotiate with La Cellophane?

A. Yes, I do.

Q. What instructions were given Mr. May, if any, that
9834 you recall as to what he should seek to achieve when he went abroad?

A. Well, by that time I think we had agreed that what we would like to get would be the enlargement of our export rights, and he was sent abroad to notify the French that that is what we wanted, particularly rights to South America.

Q. Was he authorized to make any commitment on behalf of Dupont Cellophane Company while he was in Europe?

A. You mean any final commitment?

Q. Yes.

A. No.

Q. Do you recall that he later reported back on an agreement he had negotiated?

A. Yes, I do.

Q. What did the Board, if anything, do with respect to the report he brought back?

A. Well, there were certain things in that report that he brought back that the Board did not agree with, and they were changed.

Q. Do you recall what they were?

A. Not too clearly, but I think that one had to do with prices in South America, of course. I am not sure at the moment what the other questions were.

9835 Q. Do you recall whether or not at that time you saw a report of a meeting which Mr. Swint and Pickard attended in February in France which is known in this case as Government Exhibit No. 1414, a meeting of a group of people discussing cellophane matters?

A. Yes, I have certainly seen this report.

Q. Is it your understanding that du Pont made any commitments on the subject matter of that report?

A. My understanding is we definitely did not.

Q. After the agreement was worked out with the French, Mr. Yerkes, did du Pont and La Cellophane sell in South America at the same price?

A. Of course, I have no definite knowledge of that. I don't know exactly what the French sold at and I don't know what we sold at. To the best of my knowledge, I would say that they didn't sell at the same price because the French, as I recollect, never sold at the same price themselves.

Q. Did you have any agreement or arrangement with them to sell at the same price?

A. We certainly did not have any definite agreement with them. I think, to the best of my recollection, in the beginning when the arrangements were finally made we may have said something to

the French, "All right, we will do the best we can down there with you and see how it works out. I don't think it is going to work out but we will paddle along and see what happens."

9836 That is about what happened, as I recollect.

Q. Did you have any agreement or understanding with the French to observe quotas in your sales to South America?

A. We had an expression in there called equal rights which we interpreted as equal opportunities to sell down there. We never had any quota with the French because the truth of the matter is we never knew what the French sold down there and they never knew what we sold down there.

Q. Did du Pont ever become a member of a European cellophane cartel?

A. No.

Q. Did you or the board of the Cellophane Company ever approve the idea expressed in Government Exhibit 1414 before you or in some of Mr. Pickard's correspondence involving the suggestion that a joint selling agency among all producers be organized?

A. I have forgotten the first part of your question.

Q. Did you ever approve Mr. Pickard's suggestion that a joint selling company be organized among European producers?

A. No.

Q. Did you ever join in such selling company?

A. No.

Q. Were Mr. Pickard or Mr. Swiat ever authorized to make any agreement abroad with foreign cellophane manufacturers on behalf of the du Pont Cellophane Company?

A. No.

9837 Q. Did you ever authorize La Cellophane to act for du Pont as its agent or representative in cartel meetings abroad?

A. No.

Q. Did you ever make any agreement with Sidac under which Sidac would not sell in the United States?

A. Agreement with Sidac?

Q. Yes.

A. No.

Q. Did you ever make any agreement with Wolf under which it would not sell here?

A. No.

Q. Now, the record shows, Mr. Yerkes, that from time to time you kept Mr. Bernheim and some of his associates abroad advised on matters relating to the business, such as prices, tariffs, plant expansion and other matters. Why did you keep him so advised?

A. I can only answer that by saying that while he wasn't a member of the board he was the more or less official contact between

the French and ourselves, and what information and letters I wrote to him were just business things that I thought would be of interest to him. They were stockholders, large stockholders in the company and it was just a natural sequence to write him from time to time of what was going on.

Q. Do you recall that the agreements with the French on
9838 cellophane were canceled at the time the Germans invaded France about the time of the Second World War?

A. Yes, the agreements on cellophane and rayon and the whole shooting match was canceled, as I remember.

Q. Did you have any understanding or agreement with the French at that time that you would revive the agreements at some later date?

A. No. As a matter of fact, as I remember that, the cancellations came from them, obviously with the Germans sitting over their shoulders, and we acknowledged the cancellations and that is all there was to it.

Q. You had no purpose or desire at that time to revive the agreements at some future date?

A. No.

Q. Now, I want to turn to Sylvania. You have heard of Sylvania, I assume?

A. Yes.

Q. To what extent are you familiar with the negotiations that led up to the Sylvania moistureproof patent license agreement?

A. I am pretty familiar with them.

Q. What did you have to do with it?

A. I had quite a lot to do with it.

Q. Will you tell us what you recall as to the course of those negotiations?

9839 A. Well, do you want me to go back to the beginning?

Q. Go back to the beginning and tell us the story as you recall it.

A. Well, after our moistureproof patents were issued we realized, shortly afterwards, that Sylvania was infringing our patents and we notified them to that effect.

Eventually we started to bring suit against them and then negotiations were started to see if the suit could be withdrawn and if some agreement could be made under which they would obtain licenses under our moistureproof patent as well as the other patents. That went on, I imagine, for a matter of probably a year or two until we eventually got together and discussed this contract and finally arrived at the contract that is now written.

Q. Do you recall discussing terms of settlement with Dr. Wallach in July 1931? I show you Government Exhibit 2483 in connection with that question?

A. Yes, I do recall this.

Q. Now, at whose suggestion was this conference held, du Pont's or Sylvania's?

A. Well, it is pretty hard for me to be too definite about this, but my recollection is that Dr. Wallach, as I remember it, was sailing for Europe about this time and I think he asked me to put down on paper our ideas of how this thing should be
9840 settled as a matter for discussion. I think this came about as a result of Wallach asking us what we thought would be reasonable terms. That is my best recollection.

Q. Do you recall where the conference with Dr. Wallach took place?

A. This conference?

A. Yes.

A. It was in my apartment in New York.

Q. Dr. Wallach came to your apartment and you discussed the matter set forth on this exhibit; is that right?

A. I think that is correct.

Q. Did he accept or decline the proposals, the six proposals there listed?

A. Well, he didn't agree with these. You mean did he at that conference, do you mean?

Q. At that time or any time. What did he do about your proposals?

A. He didn't agree with these. I think he eventually told me or wrote me that some of these things were not acceptable and I think he suggested others. At that particular conference I don't think he answered any of these things specifically. I think he said, "I will put this in my pocket and think it over," and I think he went to Europe shortly after that time.

Q. After he said he wouldn't accept these proposals you filed suit, did you not?

A. Yes.

9841 Q. Who reopened the negotiations after you brought suit? Do you have any recollection of that?

A. My recollection of that is, and it is not too clear, but my recollection is that the Sylvania attorney either wrote or talked to our attorney and suggested that Sylvania would be willing to settle and we would like to reopen the negotiations. That is the best of my recollection. It is not too clear but I think that is how it happened.

Q. Did you conduct negotiations for du Pont?

A. Well, yes and no. I think we all had a hand in it. I think John Hatt had a good deal to do with the preliminary discussions.

Q. Who do you recall did the negotiating on the Sylvania side?

A. I think that was entirely Wallach, as I remember it.

Q. After you reached settlement and the formal agreement was entered into did that agreement contain all of the understandings that you had arrived at with Sylvania?

A. Yes.

9842 Q. Did you have any understandings of any kind outside the agreement as to prices or commercial matters?

A. None whatever.

Q. Why did Dupont settle this suit, Mr. Yerkes?

A. Well, I don't think I can answer that as well as Mr. Carpenter answered it. I read his testimony about that, and like most of these things there were arguments back and forth whether we should settle or whether we should not.

Q. Did you favor settlement?

A. I always favored settlement if the settlement could be obtained on reasonable—what I thought was reasonable terms.

Q. Why did you favor settlement?

A. Well, in the first place, as far as I was concerned, we had the greatest confidence in our patents and I felt from a layman's standpoint if this suit went on that our patents would be validated. That was number one.

Second, if the suit did go on it was always possible that we might not win. That is always a possibility in my opinion as a layman. It was a remote one, but still it was always there. So that if we lost, our position obviously would not be good, if we won we would have in both cases spent a great deal of time and money and probably if we won the suit we would have to or voluntarily license Sylvania anyhow. It was just a question of dis-

9843 cussing the pros and cons back and forth, and we came to the conclusion that it would be advisable to settle.

Q. There is a document in evidence dated January 1933, Government Exhibit 2491 which I would like to show you. Do you recall ever having seen that document? There is no signature of any kind.

A. Yes, I have a recollection of seeing this document.

Q. Whose document do you recall it is?

A. I am quite certain this is Mr. May's handwriting at the bottom.

Q. I want to discuss this document with you a bit, Mr. Yerkes. Did you settle this suit because of lack of faith in your ability to establish the patents?

A. No.

Q. Did you settle this suit because you felt that your specific method of moistureproofing would be but one of several that might be discovered during the next few years?

A. No.

Q. Did you have any thoughts about that question at all as to whether it would or would not be the specific method of moisture-proofing?

A. Well, obviously in our position we must have always had a vague idea that something might come out of the sky some of these days that would be a different method, but we hadn't any very serious feeling about it at that time, because we had established our method and it was a good one and it had been going on in a big way, and we did not eliminate entirely the possibility that something else might happen, but it was not a factor.

Q. Did you settle with Sylvania because of a desire to minimize competition by restricting the number of manufacturers?

A. No. There were no other manufacturers.

Q. As a matter of fact, Mr. Yerkes, did you in the negotiations accept anything that Sylvania suggested?

A. Anything that they suggested? Well, I think it is perfectly clear that we did not accept everything that they suggested, but if you ask me what they suggested that we did not accept I can't recollect at this time.

Q. Did you bargain this out or did you just take their deal as they laid it on the table?

A. Oh, yes, of course we bargained it out.

Q. How long did the negotiations take, as you recall it, from the time that they started after the suit had actually been filed?

A. I don't know, Mr. Gesell. I would only be guessing about that. If you ask me to guess I would say a year, but I don't remember.

Q. Now, there is another document in this case dated February [illegible], which has been marked Government Exhibit No. [illegible] and which has at the bottom your typewritten initials E. I. Y. Do you have any recollection of ever having written that document?

A. I frankly don't remember writing this document. I see it has my initials at the bottom, so obviously I may have written it, but I don't recollect it.

Q. Did you ever have, Mr. Yerkes, any agreement or understanding with Sylvania that you and Sylvania would present a united front in an endeavor to keep other people from manufacturing cellophane?

A. Would you mind repeating that question?

Q. I say did you ever have any agreement or understanding with Sylvania that you and Sylvania would present a united front to keep other people from manufacturing cellophane?

A. No.

Q. Who was it that suggested an exclusive license, Dupont or Sylvania?

A. Well, we in this memorandum g843 make it pretty clear that we originally suggested a non-exclusive license.

Q. Do you remember who it was that suggested an exclusive license?

A. I think they must have.

Q. In connection with these negotiations was there any discussion of prices?

A. I frankly can't answer that. If there was any dis-
9846 cussion it was brought up by Wallach, because we were never in favor of having any discussion of prices. Whether Wallach ever brought it up and we said no, I can't recollect.

Q. Were you and your associates advised by counsel in connection with these negotiations?

A. Yes.

Q. Did your attorneys approve the agreement at the time it was made?

A. Yes.

Q. Did you ever at any time learn from Sylvania directly or indirectly that anyone in Sylvania considered the agreement illegal?

A. Would you mind repeating that?

Q. Did anyone in Sylvania ever tell you or anyone else in Dupont to your knowledge that they considered the agreement illegal?

A. Absolutely not.

Mr. GESELL. Your Honor, I think we might take a mid-morning recess.

The COURT. Ten-minute recess.

(At this point a brief recess was taken.)

By Mr. GESELL:

Q. Mr. Yerkes, can you tell us who it was in the Du-
9847 pont Company that set the patent policies as to cellophane?

A. Would you mind repeating that?

Q. Who it was in the Dupont Company that set the policies as to cellophane patents?

A. In the Dupont Company?

Q. Yes.

A. At what period are you talking about?

Q. Let us talk about the period first of all up until 1936. Who set the policies, the patent policies of the Dupont Cellophane Company?

A. Well, if I understand your question correctly, there were no definite patent policies put down in writing. They would have been set by the Cellophane Company previous to the formation of the department.

Q. And after the formation of the department who set them?

A. Well, the Dupont Executive Committee set down general rules of patent procedure, very long documents, most of them.

Q. What did you have to do, if anything, with carrying out patent policy at any time?

A. Well, obviously as President of the company up to the dissolution I had general supervision of what was done patent-wise. We had no specific patent policy. I mean we had no definite—we took it as it came more or less.

Q. Did you concern yourself with patent matters to any
9848 great extent in that period?

A. No.

Q. What about the situation after the Rayon Department was organized?

A. Well, after the Rayon Department was organized we went through the procedure that was set forth by the Executive Committee of the parent company.

Q. Can you tell us, Mr. Yerkes, what Dupont's objectives were in entering the cellophane business and what it was that you had as your over-all program or philosophy for developing that business?

A. You have asked me two or three questions. Would you mind just asking the first one first?

Q. What were your objectives when you entered the business?

A. Well, our first objective was to make some money and build a business up. The normal objectives that anybody has when they start a new business.

Q. After you got started what was your general program or philosophy for developing that business, for building it up, to use your expression?

A. Well, I think I better go back to the French situation to explain that maybe a little more clearly. The French cellophane business was based on package wrapping and also I think more importantly on making articles of cellophane, like
9849 artificial flowers and all kinds of little things which the French are adept at; and when we first visited the French plant they had literally hundreds of girls making these articles.

Well, I think our conception almost immediately was that that was a part of a business which we were not going to be interested in; that what we were looking for was a wrapping and packaging business.

The French, I suppose, got into this position due to the very nature of France. They didn't have these enormous consumer products that we visualized in this country. On the other hand, we had no desire to get into the manufacture of these "doodads". So that our first conception was different from the French set-up,

and what we immediately began to look forward to was a volume business in the packaging field. If anybody wanted to make these other things we would sell them the cellophane and let them make them. Does that answer your question?

Q. Yes. Then having this idea in mind of getting into the packaging business what was your general over-all program or plan for developing cellophane in this country in the packaging business?

A. Well, that is a pretty big question and it covered a long period of time.

The first important customer that we had was Steven
9850 F. Whitman, the candy manufacturer, and we got them in a rather large way in the overwrapping of candy boxes, and that was a pretty difficult job, and we felt that we had accomplished something when we got Whitman started. Well, that whetted our appetite, so to speak, and we went along concentrating on the package wrapping field.

Q. Well, now, what policy did you adopt with respect to prices?

A. Well, I have forgotten the exact price that the original cellophane was sold for, but it was—I don't know, $1.50, $2.00, $2.50 a pound. It was way up in the high prices, and from the very beginning we realized that the price of cellophane was going to make it difficult for us to get into these other fields, and therefore the only thing open to us if we wanted to expand the business was to get the price down.

Q. How did you go about getting the price down?

A. Well, I think in perfectly normal ways, by decreasing our costs and increasing our efficiency.

I remember when the first cellophane machine was started—I am not sure that this figure is exactly correct, but we will say, for example, that it ran twenty yards a minute. I think in six months we had machines running thirty yards a minute, and our whole object in the early years was to get our costs down in any way that we could and to improve our product.

9851 Q. What did you have to do yourself with establishing the company's prices from time to time?

A. I had most to do with it.

Q. When you decided on a price change what procedure did you follow within the Company? Was that discussed with other people, and if so, whom? How did you go about it?

A. You mean was that discussed with other people within the company?

Q. Yes.

A. Price reductions, you can't generalize and make a specific statement that would cover all the price reductions. In almost every case the price reductions would originate with the sales department, the idea.

Q. Then what would happen with the idea?

A. Well, the idea would be passed up through the cellophane management and they would approve or disapprove of it and eventually they would come up to me and say, here it what we think we ought to do, and I would, in most cases, talk it over with the board and we would decide or not to make the price reduction.

Q. Did you fix arbitary and non-competitive prices, Mr. Yerkes, for cellophane?

A. I don't know what you mean by arbitrary. I suppose any price you fix is an arbitrary price. No, we didn't fix an arbitrary price.

9852 Q. Did you fix non-competitive prices?

A. Non-competitive with what?

Q. Did you consider your prices non-competitive, your cellophane prices?

A. I don't think I follow what you mean.

Q. Let me ask it this way: In setting your prices did you take competition into account and if so what competition?

A. I thought I explained that or maybe I just bordered on it. We always took competition and competitive prices into consideration, the price of glassine and waxpaper, which were our competitors, whose business we were always trying to get and obviously when we made a price reduction we had something in view that we thought would meet that particular situation.

Q. To what extent in the discussions in the board and elsewhere did you discuss these competitive considerations as underlying your price program or your price reductions?

A. I think they were discussed very frequently as to how much reduction would have to be made to get into this business or that business, or how much glassine business we could get if we reduced the price X per cent. That was always in our mind. It was more or less of a guess obviously.

Take the bread business, for example. We nibbled at the bread business. We would get a little and then lose it and then we would get a little more. Every time we reduced the price we could see plainly where we got more business.

9853 Q. Did you take into account when you were setting your prices the possibility that somebody else might enter the cellophane business or that cellophane was being imported into the United States?

A. We would not have been human if we had not thought about possible competition, and I certainly would not deny that we did at times think about other people coming in.

But our main theory and our main object all through the years was based on our competitive situation versus the other wrappers, those fields where the field we could get into. They were only ob-

jectives we had. They weren't any big new things that nobody was in that we could go out and sell cellophane to. We had to go into the wrapping field that was already occupied.

Q. Did you ever at any time put the price of cellophane down below its cost?

A. No.

Q. Did you find in setting your cellophane prices that you were able to set a price and know that you would make a pre-determined rate of profit?

A. No.

Q. Were you, in fact, able to make a pre-determined rate of profit?

A. No, we were not. We figured on what we could make if we made so and so, what we could do if we did so and
9851 so, but it wasn't actual. It was only a forecast. We never could figure on an exact pre-determined rate of profit.

Q. Do you recall on occasion when an advance announcement was made of certain price reductions?

A. Yes.

Q. Did you participate in discussions with Mr. Walter Carpenter concerning that price reduction?

A. Well, I must have. The idea came from Mr. Carpenter and it was discussed and we agreed to it. I mean, the board and the management thought it was a good idea, but the idea came from Mr. Carpenter.

Q. What do you recall were the reasons for making that particular advance price announcement?

A. As I remember that, I think it was set forth in Mr. Carpenter's letter the reasons that he advocated this; namely, that our customers at that time had big inventories and were building up big inventories and we could not supply the demand, and at the same time we were building a new plant or adding to a plant which would come into operation a few months hence. So we thought by this announcement that we could slow up the buying because obviously if a man knew he was going to get a lower price a few months from now he would wait for that price, and by that time we would have the new plant in operation to supply the demand.

Q. Did you also discuss at that time the possible effect
9855 on competition of the price decreases?

A. I don't know. We may or we may not. I can't answer that definitely. You asked me whether it was discussed, didn't you?

Q. Yes.

A. I can't remember that.

Q. Were you ever able in setting the price to forecast the precise additional amount of cellophane you would sell because of any particular reduction?

A. No.

Q. During the period you were general manager of the Rayon Department and the earlier period when you were president of the Rayon Company, taking that whole period, approximately what was the percentage of du Pont's position in the manufacture and sale of rayon in the United States?

A. When we started there was only one manufacturer over here. That is now the American Viscose Company. In the early years our percentage was very low. You asked me throughout the whole period?

Q. Throughout the whole period.

A. I would think our average was perhaps twenty per cent.

Q. During that period did your prices decline or increase?

A. They had very much the same pattern as cellophane except not as direct. There were more ups and downs but
9856 the overall pattern of rayoff was—I think in 1920 when we started to make rayon we probably sold it at, I am guessing at this, but at a round $2 or $2.50 a pound. Today it is—I don't know what it is today. But when I left the company seven years ago it was somewhere around fifty or sixty cents a pound.

9857 Q. Well, now, while those price declines were taking place was the volume increasing?

A. Oh, yes, materially.

Q. Did you have any different policy with respect to rayon than you did with cellophane as to prices?

A. I think the basic fundamental policy was the same. The more you could reduce your price within reasonable limits,—in other words, the cheaper you could put your article to the public the more you would sell.

Q. Did Dupont have any agreement or understanding with Sylvania regarding the price at which cellophane or caps and bands would be sold, Mr. Yerkes?

A. No.

Q. Did you ever tell Sylvania in advance that you were going to make a price change?

A. I did not.

Q. Did you discuss prices with Sylvania?

A. No.

Q. Did anyone to your knowledge ever discuss prices with Sylvania?

A. No.

Q. Did you have any agreements with any foreign cellophane manufacturers governing the price at which they would sell in this country?

A. No.

9858 Q. Now turning to capacity, to what extent were you responsible for formulating company policies with respect to plant expansion, plant capacity?

A. To what extent was I responsible?

Q. Yes.

A. Well, I think in the final showdown I was practically entirely responsible subject to the Board and, of course, eventually subject to the Executive Committee. I was responsible for the recommendations.

Q. You would recommend plant expansion to the Board and the Board would decide whether or not to expand; is that the way it went?

A. That is correct.

Q. Well, can you tell us why it was that during this period Dupont kept expanding its capacity?

A. Well, I think the answer to that is a normal one. We expanded because we either had more business than we could supply at the moment and plus the business that we thought we saw in the offing.

Q. Did you ever expand with the idea of obtaining any fixed percentage——

A. No.

Q. (Continuing.) Of the cellophane market or other flexible packaging material market?

A. No.

9859 Q. Were there any standards that you had to meet before you could expand capacity? Did the Board have standards?

A. When we were a separate company, as I recall, there was no definite standard in our—well, I will put it another way. The Cellophane Board never put down a standard that we had to meet in order to get money to build a new plant. It was just the combined judgment of the Board at that time whether we had the money, what you are going to do with this plant, where we were going to put it, and so forth, and so forth.

Q. Did you expand capacity in excess of what you considered at any given time to be the immediate and reasonable requirements of the business?

A. No.

Q. Throughout this period were you usually in an oversold or undersold condition?

A. We were usually oversold.

Q. Do you recall at any time seeking to create an artificial shortage of cellophane, making less than was needed?

A. Seeking to create an artificial shortage?

Q. Or any kind of a shortage?

A. No.

Q. Did anybody ever try to encourage you or instruct you to construct capacity in excess of that which was required to meet the demands as forecast by the Sales Department?

9860 A. I didn't get the first part of that. Did anybody what?

Q. Instruct you or suggest to you that you should create capacity in excess of the demands which the Sales Department estimated?

A. No.

Q. Can you tell us, Mr. Yerkes, briefly what the circumstances were with respect to the conversion of the Buffalo plant to Cordura yarn at the time of World War 2?

A. Well, my recollection of that is not too specific. The Government wanted more rayon for tires and wanted it very badly, and they asked us if we could increase our output. We had this idea that we could convert the old cellophane machine at Buffalo to make the tire yarn for the Government during the war, and after a considerable amount of experimental work on that machine we did work out a method of making the yarn on the machine which, I am not sure, but I think they are still using. I am not sure about that.

Q. At the time that you converted the machine to Cordura yarn were you operating all your cellophane machines at full output?

A. Well, that ought to be a matter of record and I can't—my recollection is that there was a low in the cellophane market at that time. I am not too clear about that, but that is my recollection.

9861 Q. Turning to another subject now, Mr. Yerkes, the Government has contended in this case that Dupont engaged in industrial espionage. What have you got to say about that?

A. You mean with regard to cellophane that we engaged in espionage in the Sylvania plants? Is that specifically what you mean?

Q. Yes, and the plants of other competitors and potential competitors?

A. Well, we certainly did not.

Q. Did you try to keep in touch with developments in the business?

A. Yes.

Q. Why did you do that?

A. Well, that is just a natural part of running a business, to keep in touch with what your competitors do. We did that certainly in rayon, not ever by any underhand methods or espionage, but just the ordinary course of events.

Q. Turning to another subject, do you recall the circumstances which led Dupont to license Visking under the Cohoe patents and to take a stock interest in Visking?

A. Yes, I do.

Q. Will you tell us what you recall about that?

A. Do you want me to go back to Freund's beginning?

Q. Yes; that is when you licensed him.

A. I mean the history of Freund before we licensed him.

9862 Do you want me to go back?

Q. Tell us how you happened to license Freund under the Cohoe patent?

A. Well, the Cohoe patent was a patent covering the use of glycerine in—I don't know whether it is specifically cellulose films. I think it was. It covered the use of glycerine for softening purposes, and we had acquired the Cohoe patent in connection with the use of glycerine in cellophane. Freund came along with his sausage casing business and ran against the Cohoe patent which covered the use of glycerine for softening purposes in cellulose films. I don't know whether even the word "films" was in the patent, but anyhow it covered the sausage casing field in a broad way. So Freund came to us and asked us about this Cohoe patent and if he could get a license under it, and the license was negotiated and the Dupont Company took a certain amount of stock in Freund's company in payment for this license.

Q. Why did you take stock in his company? Why didn't you make him pay for the license?

A. Well, you ask me why I don't? I had nothing to do with it. I mean it was the Dupont Company that negotiated that deal with Freund. We were, of course, cognizant of the whole thing, but the Company took the stock. The Dupont Company took the stock. And presumably they took it because Freund did not have any money to pay for it.

9863 Q. Did you have contacts with Mr. Freund from time to time and with Visking after the license?

A. Well, my contacts with Freund were very, very infrequent, my own personal contacts.

Q. You had some?

A. I had some throughout the years, maybe a half dozen; but usually the contacts were not direct with me. It would happen if he came to New York and saw Ben I would walk in the office and see him. My contacts with him direct on any piece of business were practically nil.

Q. Did you ever hear it from any of your associates or from Mr. Freund an expression on Visking's part that it desired to enter the manufacture of cellophane sheets and rolls? Did anyone ever tell you that Visking wanted to go into the cellophane business?

A. No.

9864 Q. Other than the license agreement that was in effect between du Pont and Visking, was there any understanding or arrangement which would have prevented Visking from manufacturing cellophane that you knew of?

A. No, not to my knowledge.

Q. While we are talking about caps and bands and matters of that kind, Mr. Yerkes, what do you recall about the acquisition of Capes-Viscose?

A. Well, we get back to the Blum brothers to a certain extent in that business. They suggested to us that we buy Capes Viscose Company and obviously that came from the French. The French said, Henry Blum, "Can't you get the du Pont Company to buy Capes-Viscose Company?" We went out and looked at the plant and eventually bought it.

It was, to a considerable extent, a matter of going along with the Blums and the French to do something that they wanted. That wasn't a business that we particularly wanted to get into. The plant was certainly a most decrepit, old place. It was done purely because the Blums said, "You French partners would think it would be very nice if you take this thing and buy it." That is about the way it happened.

Q. Was there any territorial agreement governing band and cap sales at that time, and if so, will you tell us what was done about that agreement; if anything?

A. You asked me a lot of things that happened a good

9865 many years ago. My recollection of that is we certainly, at the time of the consummation of the sale, there was nothing said about any territorial arrangements, but after the thing had been consummated, as I remember, we found that the Capes-Viscose Company did have some territorial restrictions.

Q. What was done about that?

A. I think that is the way it happened. Well, I am sure they were washed out very quickly.

Q. Do you recall why they were washed out?

A. I think that when that agreement was brought down to the legal department that Judge Gregg put his foot down on it. He was one of the attorneys in the legal department at that time. He said he would have none of it. I think very shortly after the

plant was bought I think we simply canceled the thing, as I remember it.

Q. After that did you or did you not have a territorial understanding as to bands and caps?

A. After we canceled?

Q. Yes.

A. No.

Q. No what? You didn't have or you did have?

A. No, we didn't have. After we canceled it how could we have?

Q. During this period did you have with respect to band prices the same general responsibility you had as to cellophane
9866 prices, Mr. Yerkes?

A. I suppose I would have to answer that yes in a theoretical way. I don't think I ever knew what the band and cap prices were. It was a thing I never paid much attention to. We had this plant and we had a salesman running it. I don't even remember anybody coming to me and saying, what will you do about the caps and bands prices? Theoretically the responsibility was mine, yes.

Q. Did you hear or understand that there was an agreement with Celon to fix the prices or an agreement with Sylvania to fix prices on caps and bands?

A. No, there was never any agreement, I am sure. We were always fussing about prices in the market.

Q. Now, the Government has also made another claim that I want to ask you about, Mr. Yerkes, and that is that sometime prior to 1946 du Pont had an agreement under which American Viscose would be kept from entering the cellophane business in this country. Did you ever have any such agreement?

A. No.

Q. With American Viscose did you have such an agreement?

A. No.

Q. Did you ever have such an agreement with Courtland during the period it had stock in American Viscose?

A. No.

9867 Q. What do you say with respect to the charge, Mr. Yerkes, that du Pont sought to suppress Sylvania?

A. We sought to suppress Sylvania?

Q. Yes.

A. I don't know what you mean by the word suppress. If you mean fought, I would agree with you, because we were very active competitors. We certainly never sought to suppress them.

Q. The Government says with respect to this competition that you attempted merely to create a semblance of competition and that you didn't really compete with them.

A. No, that is not so.

Mr. Gesell. Your witness.

Mr. Minicus. No questions, your Honor.

The Court. You are excused, Mr. Yerkes.

Mr. Gesell. Your Honor may we take our adjournment so that I can get my next witness ready by two o'clock this afternoon?

The Court. Recess Court until two o'clock.

(At this point court was recessed until two o'clock p. m., the same day.)

9868 TWO O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Offers in evidence

Mr. Gesell. Your Honor, at this time I would like to offer in evidence fourteen exhibits which were identified and authenticated on the depositions. I have prepared a schedule which I have handed to the Clerk and to your Honor, and a copy of which I hand to the Government, and I will hand one to the reporter. On that schedule we identify each of the fourteen exhibits, show what its exhibit number was on the deposition, where it is identified in the narrative summary, and the proposed number that we wish to have it marked in this case, and we will print these exhibits along with the narrative summaries.

I would like to have this schedule, in the interest of shortening up the time, taken into the transcript verbatim as our offer of these particular exhibits in evidence at this time.

The Court. Do you wish me to hand the exhibits to the reporter?

Mr. Gesell. No, your Honor, I have given him a schedule and we will reproduce the exhibits along with the other narrative material.

I don't think there is any purpose in my reading off the
9869 exhibit numbers, your Honor. It shows from the schedule. I offer them all in evidence.

The Court. For the purpose of the record commence with one number and end with another.

Mr. Gesell. DX 1008A down through DX 1020C.

(The exhibits referred to were received in evidence and marked in accordance with the schedule referred to, which is as follows:)

	Description	How Identified	Where Identified	Proposed D. X. No.
	Chart: Physical Properties (Table 3, Offer of Proof).	D's Southwick	1 DX 1008, pp. 2-3	DX 1008A.
	Brief Description of Flexible Packaging Materials (Numbered paragraphs, p 9, offer of Proof).	D's Southwick	2 DX 1008, pp. 3-4	DX 1008B.
	U. S. Inquiry to Alcoa	D's Torrence 1	DX 1009, p. 1	DX 1009A.
	Alcoa's reply to Above	D's Torrence 2	DX 1009, p. 1	DX 1009B.
	U. S. Inquiry to Goodyear,	D's Ellies 1	DX 1014, pp. 1-2	DX 1014A.
	Goodyear's first Reply to Above	D's Ellies 2	DX 1014, p. 2	DX 1014B.
	Goodyear's Supplemental Reply	D's Ellies 3	DX 1014, p. 2	DX 1014C.
	Printon Letter to Sylvania	D's Goland 1	DX 1015, p. 12	DX 1015A.
	Sylvania's Reply to Above	D's Goland 2	DX 1015, p. 12	DX 1015B.
	U. S. Inquiry to Armour	D's Elmstrom 1	DX 1019, p. 1	DX 1019A.
	Armour's Reply to Above	D's Elmstrom 2	DX 1019, p. 1	DX 1019B.
9870	Rhinelander Price Sheet	D's Nelson 1	DX 1020, p. 21	DX 1020A.
	Rhinelander Price Sheet	D's Nelson 2	DX 1020, p. 21	DX 1020B.
	Rhinelander Price Sheet	D's Nelson 3	DX 1020, p. 21	DX 1020C.

Mr. GESELL. Now, if your Honor please, at this time the defendant rests.

I think I might in the way of summation simply do what I did at the end of the plaintiff's case. I find that defendant's case has taken us twenty-eight court days and we have about 2800 pages of transcript. We have taken the testimony of thirty-six witnesses, twenty by testimony here before the Court and sixteen by way of deposition. We have a total of 1026 defendant's exhibits in evidence.

The defendant rested.

Colloquy

Mr. GESELL. Now, there is one final matter that I would like to take up before we adjourn, your Honor. You will recall that we discussed with the Court last Friday the question of patent validity. The record in this case shows that the plaintiff stated at pre-trial that it would not attack the validity of any of du Pont's cellophane or cap and band patents on its case in chief, and it made no such attack. The defendant's case is now in and the the Court stated at the conference last Friday that it would
9871 expect a statement from plaintiff when defendant completed its proof as to whether or not plaintiff intends to attack the validity of any of du Pont's patents by way of rebuttal. Accordingly, at this time we wish to ask whether the plaintiff challenges the validity of any of the claims of any patent listed in reponse to the interrogatories, which answers were offered in evidence as GX 2001 and 2001A, and in this connection I want to again state as I have repeatedly through the case that among other things the defendant relies on the validity of all of its patents listed in these exhibits in defense of the charges being litigated.

The COURT. Well, the record shows at 5864 that I suggested Friday for Mr. Minicus to give his answer. Are you ready to give it today?

Mr. MINICUS. I have a very short statement to make in this regard, your Honor.

The COURT. Very well, sir.

Mr. MINICUS. The Government will not introduce any evidence in its rebuttal case directed toward the issue of validity of any du Pont United States Letters Patent.

Now, in making that statement it is not intended that it shall in any way mitigate against the Government's right to argue from the facts already in evidence on the plaintiff's case and on the defendant's case the state of mind of the defendant or any
9872 of the co-conspirators with regard to the validity of du Pont's patents, nor is any of the foregoing intended to limit the Government in its right to argue the scope of any du Pont patent from the evidence already in the record.

I think that makes it quite clear, your Honor, that on our rebuttal case we have no intention of opening up all the issues of a validity case through a collateral attack upon the defendant's patents in this antitrust case.

Mr. GESELL. Well, your Honor, I am not satisfied with that. Either the patents as this case goes to the Court are valid or they are invalid. There has been no assertion of invalidity as to any claim, and what I want to know is whether the Government concedes that for the purposes of this case all of the claims of all of those patents are valid.

The COURT. I so understand, but if there is anything in the record which goes to the scope of the patents, Mr. Minicus states that he has a legitimate right to argue from evidence already in the case.

Mr. GESELL. As to scope, your Honor, I have no quarrel. As to validity I do. If he is to attack the validity of any claims then I need to know it.

The COURT. I think he has stated his position clearly that he is not going to attack the validity of any claim. I so understand.

Mr. GESELL. Very well.

9873. The next question is on pre-trial these same issues ran to trademarks, and the contention was made by the Government in its complaint that there was an aggressive use of invalid trademarks. All of the pre-trial as to patents has run also with respect to our effort to obtain statements with respect to the validity of trademarks, and I now want to inquire whether the Government attacks the validity of any of du Pont's trademarks. That issue goes to 33 (f), your Honor, of the complaint.

The COURT. Well, the complaint there charges the defendant du Pont with coercive use of patent and trademark rights of doubtful validity relating to cellophane and caps and bands, including efforts to institute infringement suits with the intent and effect of maintaining du Pont's monopolization of the industry. Now, from the evidence in the case so far, if my recollection is correct, there has not been any attack on the validity of any mark.

Mr. GESELL. That is what I understand.

The COURT. But there is the claim that there has been an illegal use of the mark. Do I correctly state the Government's position, Mr. Minicus?

Mr. MINICUS. You are now addressing this, your Honor, to the use of the mark in relation to the promotional converters? Yes, we have made that claim and we believe we have introduced evi-
dence to support it.

9874 The COURT. But you don't attack the validity of the mark as such?

Mr. MINICUS. No, sir.

The COURT. What is our adjourn date?

Mr. GESELL. We are to adjourn to the 24st of May, your Honor, Wednesday, the 21st of May.

Mr. MINICUS. That is also my understanding, your Honor.

The COURT. You may be back to see me, as I understand it, in relation to some documents which are to be produced if you run into difficulty.

Mr. GESELL. The open question is when your Honor would wish to have what you called a mid-trial conference on these rebuttal documents, and I suppose we had best take that up with the Court after we have received the documents and we know what problems there are.

The COURT. Very well. Get in communication with the Clerk and we will see if we can't give you a satisfactory date.

Mr. GESELL. Thank you, your Honor.

Mr. MINICUS. My understanding on this is Mr. Gesell will get a list of all documents that he has in his possession. In other words, we do have a merely mechanical problem here. At the earliest
possible moment I am sending our documents out for repro-
9875 duction. We are keeping copies of black negatives here which I have, and probably will have all those available at any time, but it will take us about a week, because they must probably go to the Government Printing Office to get them reproduced.

The COURT. Very well.

until May 21, 1952, at ten o'clock.

At this point the trial was adjourned to Wednesday, May 21, 1952, at ten o'clock, a. m., Eastern Daylight Saving Time.)

WASHINGTON, May 21, 1952, 10 O'CLOCK A. M., E.S.D.T.

The Court: No jury present.

The Court: Proceed, gentlemen.

Mr. Minnich: I believe that an arrangement was reached in conference the other day for the defendant to reopen the record for the purpose of putting in some depositions. They will be commented upon from time to time in the course of the Government's presentation, so if it is convenient for Mr. Gesell to do that at this time, it would be more convenient for the Government.

Mr. Gesell: Your Honor, I am glad Mr. Minnich brought this up. After the conference the other day I got back to my office and I asked myself why it was the defendant should be offering the depositions. Your Honor has stated that the summaries will be taken as accurate and complete summaries. Those are our exhibits, and they are in evidence, and it seemed to me not appropriate under the circumstances for the defendant to offer the depositions.

We are extremely anxious to follow out the direction of the Federal Rules for the handling of these matters, which precludes the admission of the depositions, and I don't like to be in a position of offering something which, on your Honor's ruling, is in our view wholly unnecessary.

Naturally, in the light of the developments at the conference, I would not raise objection to the introduction of the depositions if the Government desires them in the case, but we have the summaries in evidence and your Honor has stated you will rely on them.

Mr. Minnich: By the same token, your Honor, these are, of course, the defendant's depositions. There are only certain parts of these depositions upon which we rely. We are willing and desire to put those parts of the depositions upon which we rely, in evidence. If the defendant desires to put the remainder of the depositions in evidence, that is entirely up to them.

The Court: Well, we are back where we were the other day. I am not going to let a lot of questions go in unless it can be demonstrated now that the summaries are inaccurate.

Mr. Gesell: Could I make this suggestion, your Honor, because I am not desirous of impeding progress.

The Court: Yes.

Mr. GESELL. Perhaps your Honor could direct the depositions be made part of the record.

9879 The COURT. Well, they are already on file with the Clerk. It is true they are not in evidence. Let us make them part of the record.

Mr. MINICUS. Certainly, sir.

The COURT. Put them all in as part of the record. Now, I don't know whether you want them to be transcribed as part of the record with the Court Reporter——

Mr. GESELL. Well, certainly we don't, your Honor, and we are going on the basis——

The COURT. I think they should be made part of the record for purposes of appeal.

Mr. GESELL. And we are going on the understanding that your Honor is going to rely on the summaries.

The COURT. Unless someone can point out that they are inaccurate.

Mr. GESELL. Thank you, your Honor.

Mr. MINICUS. They will become, then, your Honor, part of the record for the purpose of appeal, and I presume we will also be able to have reference to them for our findings of fact.

The COURT. Yes.

Plaintiff's rebuttal evidence

Mr. MINICUS. In commencing our rebuttal, if your Honor please, we are going to open with what was logically the first stage of our case in chief: that is address our discussions this morning

9880 to the position of this defendant in the cellophane mart.

It will be recalled that during the presentation of its case in chief, the Government had admitted into evidence a considerable amount of statistical material which evaluated duPont's market position as a supplier of cellophane and cellulosic bands. At that stage the inquiry of the case was directed toward consideration of the degree of duPont's proportionate participation in the market place as a producer, as a possessor of productive facilities, a supplier, and so forth.

This presentation at that time revealed that in terms of the sources of supply for cellophane, the market was dependent upon duPont to the extent of approximately 76 per cent. In the field of cellulosic bands the relationship was in the neighborhood of 70 per cent. Our statistical study admitted at that time all terminated as of the year 1947, which was the date of the filing of the complaint in this action. At the conclusion of the Government's case the defendant filed a supplemental action for the purpose of extending its proof beyond the filing date of the complaint.

In support of the allegations therein, certain tables were placed in evidence by the defendant. These were Defendant's Exhibits 536, 538—536 was addressed to the sales of duPont and Sylvania. 538 was addressed to Sylvania's earnings; Defendant's Ex-
9881 hibit 600 was addressed to the relative production, and Defendant's Exhibit 601 was addressed to capacity statistics.

None of these, however, sets forth the relative participation in the later years in terms of percentages by both duPont and Sylvania with regard to these market functions.

The Government does not consider it necessary to reiterate its position in entire detail, but will emphasize duPont's relative market position in the recent years by limiting its presentation to the market factors of production, capacity and sales.

The Government desires to introduce at this time three statistical tables, depicting the relative market participation between duPont and Sylvania down through the year 1950. To avoid unnecessary duplication, these tables are offered as substitutes for the exhibits already in evidence.

Offers in evidence

Therefore the Government offers in evidence Government Exhibit No. 531–A. This exhibit is designed to replace the existing Government Exhibit 531. The new exhibit appears at page 7326 of our bound volumes.

Government Exhibit 531–A is also Table #1, and presents the annual production of cellophane by companies.

(The paper headed "Annual production of Cellophane by
9882 Company", was received in evidence and marked Government's Exhibit 531–A).

Mr. MINICUS. We offer in evidence Government's Exhibit 537–A. This is in place of Government's Exhibit 537 and now appears at page 7327 of the bound copies. This is headed Table 5, and shows the annual potential capacity to produce cellophane by Companies.

(Table 5, headed "Annual Potential Capacity to produce Cellophane by Companies", was received in evidence and marked Government's Exhibit 537–A.)

Mr. MINICUS. The Government offers in evidence Government's Exhibit 541–A, in place of Government's Exhibit 541, and which now appears at page 7328. This is titled "Table 9, the Annual Dollar Sales of Cellophane by Company."

(Table 9, entitled Annual Dollar Sales of Cellophane by Company", was received in evidence and marked Government's Exhibit #541–A.)

Mr. MIXICUS. Returning for a moment to the table in Government's Exhibit 531-A, and which presents these relative productive statistics for cellophane for the year beginning 1924 and continuing through 1950, it will be noted that the first column presents the dates continually by calendar years. Then in the second column we have the total production for the industry in each of those years.

The next two columns present duPont's and Sylvania's participation in that total production, and in the final two columns
9883 at the right hand side of the table are presented the relative participation in terms of percentages.

The COURT. Will you identify these documents for me so that I may have a clearer understanding of their source?

Mr. MIXICUS. Yes, sir. Of course, down to the year 1947 their source will be the same as the documents that they originally represented.

The COURT. But who compiled these statistics? Give me the background of these documents.

Mr. MIXICUS. Yes, sir. The original statistics were compiled by Mr. Mitchell and Mr. Cook at that time, and he testified to their authenticity and correctness on the witness stand, and gave the Government's sources, which to a large degree were the result of interrogatories addressed to the duPont and Sylvania Companies.

Then for the years '48, '49, and '50, where we did not have that original information, the footnote indicates that we had it from Government Exhibit #539, and for the year 1950, from Defendant's Exhibit 600. For Sylvania, we have it from Government's Exhibit 410, except for the year 1950, where we relied on Defendant's Exhibit #600.

The COURT. May I inquire of the Defense, are these figures challenged?

9884 Mr. GESELL. Well, your Honor, they were originally, and they still are in certain respects. If your Honor will look at the groupings at the bottom, those are purely arbitrary groupings, which bear no relation, as we see it, to any aspect of the case, and they are misleading in certain particulars for they group years in which Sylvania's production is not available, and yet they show the production, without indicating that fact.

That is true as to 531 and is also true as to 541-A. Those infirmities were pointed out at the time of the initial introduction of the Exhibits.

Now, they are also in error in another respect in that they do not take into account two additional factors. They do not take into account the Olin production, and they do not take into account imports.

Subject to those qualifications, and inaccuracies in the percentages, which we don't challenge as they are minor, we don't object to the figures.

Mr. MINICUS. I would like to take a minute to respond to that, your Honor.

The COURT. Yes.

Mr. MINICUS. With regard to the fact that there is some Sylvania production not shown here, if your Honor will have reference to the year 1930, which was Sylvania's first year, you will see a footnote at the #1 there. That is the first year of Syl-
9885 vania's production. They started in the middle of that year, if my recollection is correct, and the records of the Company were not conclusive, if existent at all. However, you will notice in the following year that the total production operating for a full year was only 3,715,000 pounds. Our investigation showed that that production was not significant for the year 1930 and we were very sure in our minds that it fell below the figure of 1,000,000 pounds. But not having a definitive figure to put in there, we have it omitted. However, for the total of any proportionate participation in that market, that figure, whatever it might have been, would not have changed any of these percentages one tenth of one per cent.

Now, as to our groupings at the bottom, it will be noted that we have first percented the group 1924 to 1929, and we say that none of these are arbitrary. We can't think of any other groupings that would present anything, and any other grouping would be arbitrary; '24 to '29 is presented to show one simple fact, that in that period nobody else was producing cellophane in the United States and for that period duPont had 100 per cent of the production.

The period 1931 through 1947 is presented to show the total period of joint production by duPont and Sylvania during the period in which they were both operating in the market, down to the date of the complaint. That was our original statistic that was in here.

Then the period 1924 to 1947 shows the relative
9886 participation for both companies for the entire period.

Now, it is quite true that for the first five years Sylvania was not producing, but you will note that the percentage changed very little; that is because the production was so slight during those years. Instead of 75.7 it is 76.2.

Then the period 1944 to 1947 was taken not because the Government derived any advantage from it—I think we could have taken periods that probably would have showed better statistics—but they were the three years immediately preceding the filing of the suit, so we gave that grouping to show what the picture was at the time this suit was filed.

Now, the final grouping, 1948 to 1950, is the new statistic in this chart, and that shows the relative participation in the market place since the filing of the complaint. That is the purpose of that grouping.

Now, as far as imports are concerned, it is not intended—and perhaps our heading should have shown "domestic production"—it is not intended that imports should be shown in this chart. However, with our other charts in the case on both sides, that do show the degree of imports, and it also shows that in practically every year the imports of cellophane amounted to less than $\frac{1}{10}$ of one per cent, so it is also apparent that if we had included the
9887 imports in this chart, it would not have changed the relative percentages to any degree.

Now, with regard to the objection that Olin's production is not shown in this chart, it will be noted that the last statistic is 1950. Olin did not get into production until the middle of 1951, and that is a topic that we will come to in just a few moments. We intend to cover that and not ignore it.

Now, with regard to this chart, or table, it is, we believe, important to note that the relative degree of duPont's dominance as a manufacturer of cellophane has been greater in each of the three years subsequent to initiation of this suit, than it was in any year for more than a decade, immediately prior to filing the complaint.

During the year 1949 duPont manufactured 78.1% of all of the cellophane produced in the United States. This was its highest relative participation, as the table will show, since the year 1933, which was immediately after the commencement of Sylvania's full scale production.

It is also interesting to observe that for the post-complaint period, from 1948 through 1950, duPont's relative participation in production was 77.6%—and this is a greater degree of dominance than it enjoyed during any comparable span of years subsequent to 1933.

This table, we believe, establishes, beyond argument, that as a producer of cellophane, duPont's dominant position has
9888 actually been augmented since this litigation commenced.

Government's Exhibits 537-A and 541-A present similar information in tabular form and are addressed to capacity and sales statistics, respectively.

Government's Exhibit 537-A completes for the post-complaint period, a demonstration of relative potential capacity to produce cellophane existing between duPont and Sylvania. This was originally admitted as Government's Exhibit 537.

Here again the apparently self-accelerating dominance of the defendant is revealed; whereas, during the three years prior to this suit, 1944 to 1947, the ratio between duPont and Sylvania

was 74.7 and 25.3 respectively, for the three post-complaint years duPont's participation increased to 75.5%.

Then again, Government Exhibit 541-A is a similar exposition of the market for cellophane sold. Thus in 1949, the defendant supplied the market with 79.8% of all the domestically produced cellophane available. This was the highest degree of participation achieved by the duPont Company since 1933.

Now, as I have stated, statistical data was not available to permit continuation of the presentation of these statistical facts, through 1951. Evidence previously admitted to the record, however, is indicative of certain changes which have occurred

9889 in the industry during that year. For example, the Acusta Paper Company, which is Olin's cellophane installation, commenced operations during 1951 and there is evidence of a further increase in the productive facilities of the Sylvania Division.

The record, however, bears evidence that at the present time Sylvania considers the productive capacity to be 72,000,000 pounds annually. Authority for this is found in Mr. Reichel's testimony at transcript page 6020.

Olin's productive capacity of 9 casting machines is estimated in the neighborhood of 33,000,000 pounds, and for reference here we have Mr. Olsen's statement at transcript page 6832.

On the other hand there is testimony that duPont's present capacity has been exanded to 218,000,000 pounds, and here we have Mr. McCune's statement, transcript page 5548.

Now, accepting this testimony by the defendant's witnesses, then the industry's total capacity at present is 323,000,000 pounds. A reference back to Government's Exhibit 531-A, the production table, which was just put into evidence, reveals that despite its recent expansions in capacity, the Sylvania Division has not been able to maintain the relative position it had in former years, which was approximately 24%, as against 22% today.

The 33,000,000 pounds of capacity introduced by Olin's

9890 entry into the field constitutes a new and additional source of supply for buyers of cellophane.

Now, whereas this fact broadens the base for statistical presentation of relative market participation, the impact upon duPont's dominance has not been so very great. Estimating the defendant's present share of the market at 68% on the basis of the figures I have given you, your Honor, duPont's present position with Olin in the field is only five points below the levels of 1937, 1939, 1942, and 1944; so that, it would seem to us, has been the net result of Olin's entry into this industry at the present time.

Now, evidence admitted to the record on behalf of the defendant urges the possibility that Sylvania and Olin will continue to increase their capacity. This testimony naturally refers to facts

which will take place in the years ahead. On the other hand, as the Government's rebuttal proceeds, the fact will become more and more evident that duPont also has plans to expand its capacity to an extent which will maintain its present dominant position.

We maintain that when all of the evidence is in, regardless of the introduction of this new producer, and all of the talk addressed to the augmentation of facilities by other producers, that a future position for duPont of approximately 70 per cent will constitute a reasonable conclusion.

Now, with regard to imports. With the persistence of duPont's dominant control of the supply of domestic
9890 cellophane, the only alternative source remaining is imported cellophane.

Although the defense has introduced proof of a tariff reduction, no evidence has been forthcoming to indicate greatly increased imports. The reason for this is that there just have not been any.

In this regard we offer in evidence Government Exhibit 580, which appears at page 7329, and is a report of the competitive position of the duPont Company dated August 8, 1950.

(Report of competitive position of duPont Company dated August 8, 1950, was received in evidence and marked "Government's Exhibit #580.")

Mr. MIXICUS. We also offer in evidence Government's Exhibit 581 at page 7338 of the bound volumes, which is the monthly sales report of the film department for the month of September, 1950.

(Monthly sales report of film department for month of September, 1950, was received in evidence and marked "Government's Exhibit #581.")

Mr. MIXICUS. Returning to Government's Exhibit 580, this is a report of duPont's competitive position covering the first six months of 1950. In the second paragraph on page one on the body of the report, page 7331 of the bound volumes, there is there found a discussion of the status of imported cello-
9892 phane in 1950. It will be observed that the price quotation on 300 moisture proof at that time was 52 cents per pound, plus 30 cents per pound import duty, making a total of 82 cents per pound. This is compared with the price of domestic film of the same type and grade at 48 cents per pound. It is obvious that in the absence of shortage, imported cellophane at these advanced prices could not possibly establish a position in the markets of the United States.

Now, before leaving this exhibit, there are a couple of miscellaneous statements of interest that I would like to point out. On the cover page of the report itself at 7330, there is a listing of

products manufactured by duPont's film department and their competitive position. It will be observed as of that date in cellophane, duPont had an estimated admitted percentage of 75 per cent of the total supply available, and for bands, its percentage was 61 per cent.

Then we have laid out the relative participation of the Company in other products in the film department.

9893 Now, on page 2 of the body of the report, 7332, under a heading "Competing Films and Papers", a columnist pertinent to another subject in this case is found, to wit, and I quote: "The shortage of cellophane has created a greater demand for competitive wrapping materials wherever possible."

Now, this was the situation as late as August 1950.

Mr. GESELL. That is not what it said, Mr. Minicus.

Mr. MINICUS. I will reread that. I left out a few words.

"The shortage of cellophane has created a greater demand for competitive wrapping materials and the trade is substituting these materials wherever possible."

Now, we believe that this statement reveals a persuasive motivation for the use by the trade of some other wrapper, some of the other wrappers which have been exhibited here, and we also believe the statement implies that for some uses substitution even in the presence of shortage was not even possible.

Then Government Exhibit 581, which is the monthly sales report for September 1950, contains further consideration of the status of imported cellophane in our domestic markets. At that time, September 1950, regardless of price, the only foreign films available to domestic purchasers were of the

9894 non-moistureproof grade. Consequently, if we are to look to imported cellophane as a possible additional source of supply for domestic purchasers it is clear that little help will be forthcoming; firstly, because of its non-availability; secondly, its high price; and, thirdly, as counsel has so often urged, its poor quality renders it no more adequate as a substitute for domestic cellophane than any of the other films he has so often tried to sell as substitutes.

Then with duPont's dominance in this industry virtually undiminished and its market control as a consequence as potent as ever, the inferences of the evidence about to be offered shifts to intent or an analysis of the defendant's state of mind with regard to duPont's position in the present market and its prospects for the immediate future.

The Government offers in evidence Government Exhibit 582 at page 7341 of the bound volumes. This is impounded document number 18 according to the numbers in the Clerk of the court's

office. The title of this document is "Cellophane Expansion," and it is dated March 9, 1948.

(The paper entitled "Cellophane Expansion" dated March 9, 1948, was received in evidence and marked "Government's Exhibit No. 582.")

Mr. MINICUS. We offer in evidence Government Exhibit 583 at page 7356.

9895 Mr. GESELL. Can you go a little slower? You are skipping around and I want to be able to find these. I assumed you would follow your order.

Mr. MINICUS. I will go as slow as you wish, Mr. Gesell.

Mr. GESELL. We have an objection to 583, your Honor.

The COURT. Has it been offered?

Mr. MINICUS. Yes, at this point, sir.

Mr. GESELL. 583 is a document consisting of 60 pages entitled "Thin Films Outlook." It is dated May 16, 1949. Its author is Mr. J. A. Mitchell, who appeared on this stand as a witness for the defendant and who was not cross-examined. Under the doctrine of the Queens case I think it is clear this this cannot be admitted on the plaintiff's case. It was in the plaintiff's possession at the time, and I am sure there will be no dispute about that.

The COURT. I don't have the document before me.

Mr. GESELL. I will be glad to hand up my copy to you, your Honor.

The COURT. Thank you.

Mr. MINICUS. I would like to reply to that objection while your Honor is looking at this, if I may.

The COURT. Proceed.

9896 Mr. MINICUS. We are very well aware that Mr. Mitchell was a witness for the defendant in this case and that we had the right to cross-examine him. Our cross-examination, of course, was limited by the scope of the direct examination under the well accepted Federal rule. It is not our purpose with relation to this document to discuss any subject matter that Mr. Mitchell went into on his direct examination. In other words, we have reread Mr. Mitchell's direct examination and we consider that Mr. Mitchell's direct examination was addressed entirely to the purposes and the nature and the reason for research in the duPont Company and what the mechanics were of acquiring patents for the duPont Company.

I am also informed that the Queens case applies to the use of the document to show a prior contradictory statement made by the witness. The use of this document is in no means to impeach anything—this document itself—to impeach anything that Mr. Mitchell said. This is an entirely different subject matter we are dealing with here, your Honor. We are going to talk about the

market place as Mr. Mitchell has discussed it in this document and which he did not discuss on his direct examination.

The COURT. What about the critical pages in this document.

9897 Mr. MINICUS. Your Honor, our presentation, to avoid reading the document, will cover certain selected pages from the entire document: page 1, 2, 4, 9, 10, 12, 13, 14, 15, 17, 26, 27, 28, 29, 31, 32, 35, 36, 37, 38, 39, 40, 41, 42, and 43; and finally page 50.

Now, they will not be read, of course. There will just be reference made to various things at those positions.

The COURT. This proffered document is not to be in contradiction of anything Mr. Mitchell said?

Mr. MINICUS. I don't recall any statements that Mr. Mitchell made addressed to the present participation in the market place, anything he said with regard to future participation in the market place, or anything he said right on the subject of substitute materials. That is what we are going to discuss.

Mr. GESELL. Let us just take page 1, your Honor. On page 1 he discusses the problem vis-a-vis paper, and in his testimony he discussed the problem vis-a-vis paper; and all of his testimony was directed to research effort made to improve the quality of cellophane in various particulars where other films and other materials had the advantage and cellophane a deficiency.

This is a technical report that goes all over the area of his testimony.

This problem, your Honor, is a very real one. Here a wit-

9898 ness takes the stand and they don't even deign to examine him. He is made available to them. They have the document in their possession. The issue is an issue at that time; it is not an issue at some other time. It seems to me that what this interjects in this rebuttal case, of which this is an example, your Honor—there are many more here—they have a whole series of documents written by Mr. Smith right down the middle of his testimony, and they are offering all of them. They have documents written by Mr. Yerkes. They didn't cross-examine him. They are offering them. What are we supposed to do?

The COURT. My difficulty is this: What does this rebut, Mr. Minicus?

Mr. MINICUS. Pardon me, sir.

The COURT. What does this proffered evidence rebut?

Mr. MINICUS. At this point, sir, the purpose of this document is primarily to rebut many of the points that were made in connection with the substitute materials case in the market, not as a matter of research, but whether these things are really in the same market with cellophane. That is the primary purpose of

this document, and you will notice that 90% of my comment will be addressed entirely to this question of substitutes in this document.

I believe your Honor will also recall that Mr. Mitchell
9899 addressed himself entirely to research and patent development and not to this question of substitute materials.

In the second place, your Honor, it is our argument, regardless if Mr. Mitchell may have incidentally made some statement regarding market position or substitute materials, it is our position that the Queens case does not apply here. The Queens case is addressed to using a document for the purpose of contradiction, a prior contradictory statement. We are not showing that for this purpose at all. We are showing this to show an admission not to impeach Mr. Mitchell, but to show an admission on the part of one of defendant's representatives that is entirely in conflict with their position taken at this trial, and the Queens case has absolutely no applicability to this document.

The COURT. I am going to follow this course: You proceed, Mr. Minicus, and show me what you said you can show me, and then I will make my ruling on the admissibility of the document.

Mr. MINICUS. Thank you, sir.

Mr. GESELL. So my position may be clear, your Honor, it is our position that that is not a proper procedure to follow without calling the witness and giving him an opportunity to explain the statements made when he was here on the stand. That necessitates the recall of the witness, if your Honor please.

9900 The COURT. As I understand Mr. Minicus' proffer, it is not to contradict anything that Mr. Mitchell as a witness stated, but it is to show that the defendant's conception of substitute materials is not the same, it is claimed by the Government, as stated by the defense.

Is that your point, Mr. Minicus?

Mr. MINICUS. Absolutely, your Honor, and we claim that the things we are going to talk about here were not the subject matter of Mr. Mitchell's direct examination at all. We could not have cross-examined him on them.

Mr. GESELL. They have offered the entire document, your Honor. What is the situation? Here the entire document is offered in evidence. A statement by a man who was on the stand and available for cross-examination, and they didn't even deign to cross-examine him.

The COURT. Well, it may be that you would have the opportunity on sur-rebuttal to recall Mr. Mitchell.

Mr. GESELL. But I am not to be put in that position, if your Honor please. When I tender the witness it is his responsibility, not mine, if the court please.

The COURT. He has made a proffer of proof in rebuttal. He wants to rebut your conception of the market insofar as substitute materials is concerned. Now, I have suggested to Mr. Minicus that he proceed and see how far he can go in that ex-
9901 planation in order to give me an opportunity to form a basis upon which I can make a ruling as to whether the suggested exhibit 583 may be or may not be admitted into evidence.

Proceed, Mr. Minicus.

9902 Mr. MINICUS. The Government offers in evidence Government's Exhibit 587 at page 7433——

The COURT. Before we leave 583, are you going to show me in what connection——

Mr. MINICUS. To save time, I was going to——

The COURT. Offer a group?

Mr. MINICUS. Offer a group of documents, and then discuss all of them.

Government Exhibit 587 is impounded document 46 in the Clerk's office.

(Document entitled "Survey of Cellophane Future Capacity, Economics and Competition was received in evidence and marked "Government's Exhibit No. 587")

Mr. MINICUS. The Government offers in evidence Government's Exhibit 585 at page 7430——

Mr. GESELL. I have an objection to Exhibit 585, if your Honor please. I hand it up to the Court.

(Handing to Court.)

Mr. MINICUS. May I finish my introduction so we will know what this is? This is impounded document #53, in the Clerk's office, entitled, "Cellophane forecast, 1950 through 1955."

Mr. GESELL. There, if your Honor please, is a document written by Mr. Smith. Now, it certainly cannot be contended that Mr. Smith didn't talk about market position, percentage of sales, and potentials and forecasts.

9903 Now, there is a document—he was on the stand and he wasn't asked about it, and if I may go one step further, your Honor, he has his handwritten notes on there and you can't tell what it means without asking him what those handwritten notes mean.

The COURT. What about the objection, Mr. Minicus?

Mr. MINICUS. I believe that all of Mr. Gesell's objections are valid but——

The COURT. Let's be specific. We are now talking about 585.

Mr. MINICUS. I have got to go back to the basis of his objection, which is the Queen's case, your Honor. The Queen's case applies to questions used to impeach a witness, or documents used to impeach a witness, where the witness had been on the stand for-

merly. That is not the purpose of these documents at all. These are affirmative documents in our case of admissions, and we are not using them to impeach the witness by any means. We are just showing these as previous admissions of the defendant in this action, and the Queen's case doesn't cover that position at all.

Mr. GESELL. All this is is a statement by the witness. This isn't a statement by the defendant, your Honor. This is a memo by Mr. Smith with his handwriting down the right hand column.

9904 The COURT. I am going to rule on these matters as they are introduced, specifically. As to GX 585, the objection is sustained.

Mr. MINICUS. The record will show, your Honor, that the Government offered that as an admission and not to impeach the witness.

The Government offers in evidence Government's Exhibit 586, at page 7431. This is noted in the Clerk's office under impounded document #52, and is a letter from Mr. Kunzman to Mr. D. F. Carpenter, dated February 24, 1950.

(Letter from Mr. Kunzman to Mr. D. F. Carpenter dated February 24, 1950, was received in evidence and marked "Government's Exhibit 586".)

Mr. MINICUS. Now, returning to Government's Exhibit 582, which has just been admitted in evidence, the purpose of this document is stated to be, a consideration of the problems arising from the shortage of cellophane, the possible ways of meeting the need for more cellophane, and the economic effects upon duPont from the various alternatives available.

Mr. GESELL. Could you tell me where that appears in the document, Mr. Minicus?

Mr. MINICUS. That is the tenor of the entire document, Mr. Gesell. Consideration of these problems is predicated upon
9905 the following premise, expressed at page 1 of the report. I quote:

"Until the uncertainties created by this suit have been removed by final decision, or until our share of the market has declined, it must be recognized that additional investment in new plant capacity would be attended with risk."

An effort to estimate the immediate market demand appears at page 2.

Now, this document was written in 1948 and the table presented at that place is a forecast for the next four years running through 1951.

The COURT. I want to follow you. What is the significance of the sentence you read me?

Mr. MINICUS. That is the consideration or the premise upon which all of the future considerations in this document are based. That they need more cellophane and until the uncertainties created by the suit have been removed, or until duPont's share has declined, it must be recognized that additional investment in new plant capacity will be attended with risk.

The COURT. Can you imagine a more rational reaction than that?

Mr. MINICUS. I didn't say there was anything wrong with it. I simply said that is the premise upon which this document is written, that there is to be a temporary hiatus here until
9906 certain conditions occur, in which duPont recognizes that any expansion will be attended with risk. Now, I simply say that we start from that premise. If we don't start from that premise, the document means nothing because the whole document is based on that premise.

Mr. GESELL. Now, on that, your Honor, that, of course, is not a correct statement. It is based on the premise that there is a demand and a requirement to supply a market in excess of what can be done, and the report says that duPont has a responsibility, like all producers, to serve those needs.

Mr. MINICUS. Now, I am only trying to show in this case, your Honor, to a large degree, what the market is and their ideas on future expansion, and I am simply starting with their own stated premise of what the conditions are in which they are making these considerations. I didn't say there was anything wrong with it, but it is clear that we have to know before we start to consider their future expansions, what they have in mind in making these considerations, the purpose of these considerations.

Does your Honor desire me to strike the sentence?

The COURT. No. Proceed.

Mr. MINICUS. Now, an effort to estimate the immediate market demand, as I said, appearing on page 2. Now, this document was written in 1948, and the table presented at that page is a forecast for the next four years, running through 1951. It will be
9907 observed that by the end of 1951 market demand is estimated in this table at 320,000,000 pounds. This estimated demand, as it appears here, just about equals the present industry-wide potential for the production of cellophane, that we found with recourse to the earlier documents, and the situation that existed in 1952.

Thus, it would seem that the deficiency of demand which is set down in the right hand column of this table has by this present time become obliterated, and the market has achieved a point of saturation.

The remainder of the report, however, illustrates how misleading these statistics are——

Mr. GESELL. Well, he is offering them. Where are we now? I assume he is offering them. Isn't that right?

The COURT. I presume so.

Mr. GESELL. He is offering them as proof of the facts stated, is he not?

The COURT. He just said they were inaccurate.

Mr. GESELL. If he is not, I move to strike it, if he doesn't stand by what he is offering.

Mr. MINICUS. Is there an objection?

Mr. GESELL. Yes.

Mr. MINICUS. On what grounds?

Mr. GESELL. You can't impeach your own witness; you are offering this document as your witness. You say
9908 it is inaccurate. Therefore, it should be stricken.

Mr. MINICUS. If Mr. Gesell was listening carefully to my statements, I offered this as a forecast made in 1948 of what the situation would be in 1951, and I say that in 1951 this thing is accurate because the 320,000,000 pounds of capacity is just about what they have today. I simply say that there are other considerations now that follow a[illegible]g in this report that change the import of this table. Far be it from me to say that a duPont memorandum was inaccurate.

The COURT. Proceed.

Mr. MINICUS. Now, at page 3, the statement appears that since 1941 Cellophane has never been freely available and sales have been rationed. We have for the period back beyond 1941 Mr. Reichel's testimony that the cellophane market has always been over-sold. The results of this condition are described in this document in the following language:

"Under such limitations, it has not been possible to conduct an extensive selling campaign covering all potential markets. It has been impractical to conduct extensive sales campaigns in such fields as white bread, meat, and fresh produce, because only limited amounts could be allocated to these uses, amount far below the
potential requirements if the campaign were successful."
9909 Then turning down to the following paragraph:

"The great bulk of tobacco products that can be wrapped in cellophane have been wrapped in cellophane for some time and little increase, beyond that occasioned by the normal growth of the industry, can be expected. The baking industry, excluding white bread, is largely converted to the use of cellophane, with every prospect of continuing and expanding to include products not now being wrapped, or being wrapped in other material. It is believed that a large potential for increased consumption exists in the white

with the independent bakers. Sales in this [illegible] sufficient material to supply

[illegible] expanding rapidly. Super- [illegible] attempting to adapt their meat [illegible] to eliminate bottle neck in their pres- [illegible] wrapping is an essential, since meats must [illegible] requires that items be protected [illegible] the same reasons, the use of cellophane is growing for the packaging of fresh produce. It has been demonstrated in actual tests that cellophane packaging of items such as beans, spinach, celery, and tomatoes, not only increases sales [illegible] but outsells unpackaged goods, even when priced higher."

The report then continues. The converters are not pushing cellophane because of the shortage. Then the section [illegible] statement which appears —

Mr. Gesell. Well, that isn't a quote, is it, Mr. Minicus?

Mr. Minicus. No, I am trying to cut down some of this language here.

Mr. Gesell. It doesn't say that.

Mr. Minicus. I am sure when Mr. Gesell's time comes to speak [illegible] if it isn't here now, that he will point out any inaccuracies in my language.

The Court. He has the habit of not waiting for that. He points them out right away.

Mr. Minicus. I am used to it, your Honor.

The section ends with a statement, and I quote now, "Salesmen are mere order takers, and allocators to their trade, rather than producers of increased or new demands."

Now, I daresay that sounds from so much that was said on the [illegible] case, but here we have it in writing on a duPont document that salesmen are mere order takers.

Now, at page 5 a second table is presented, which sets forth the [illegible] demand for cellophane, on a condition provided sufficient productive capacity is available to permit aggressive selling in all markets. It will be observed that the demand thus depicted [illegible] in excess of [illegible] pounds, which is shown on the [illegible] table to be an advance beyond the amount of cellophane available by more than [illegible] per cent, in this potential market, providing sufficient productive capacity is available.

Commencing at page 6 of the report, various market factors are [illegible] which establish the essentiality of cellophane to the [illegible] economy. Among these are stated to be the following: Many manufacturers have converted their operations to the use of cellophane and have made large investments in packaging and

processing machinery; secondly that large converter companies have been formed, whose sole business is dependent upon a continued supply of material; thirdly, machinery companies are continuing to invest money in research and design to develop new machines to use cellophane and a large proportion of their business is dependent upon the continued availability of cellophane.

This section of the report then concludes the statement that unless adequate supplies become available to meet the expanding demands of the market, many of the company's customers and the company's producing cellophane packaging machinery will suffer financial loss.

Mr. GESELL. Well, that is not what the last two sentences of that paragraph state. I wish to say for the record, starting at the bottom of page 6, and going to the top of page 7.

9912 Mr. MINICUS. I am sure Mr. Gesell will give us a correct reading when his time comes, but it seems to me that is exactly the substance of what is contained there.

The COURT. Let's get it straight. The sentence which is the subject of discussion reads: "The Company——"

Mr. MINICUS. I will give you an exact quote, your Honor. The fifth line from the bottom of page 5 is just what I said——

Mr. GESELL. You are on page 6.

The COURT. We are on page 6, the last sentence at the bottom of page 6.

Mr. MINICUS. The last complete sentence.

The COURT. It reads, "The Company, as the acknowledged leader in the introduction and production of cellophane, has a definite responsibility——"

Mr. MINICUS. That is not where I was reading, sir. I am reading the sentence before that.

The COURT. But Mr. Gesell says that he wants you to read the next sentence.

Mr. MINICUS. I didn't understand him to say that, sir, and furthermore——

The COURT. I will withdraw from the discussion.

Mr. MINICUS. I would like to have an understanding with the Court, so that we will not be unnecessarily delayed. Does your Honor wish me to read these things? Now, I wasn't even reading there. I was doing what Mr. Gesell has done, in an effort to

9913 speed things up, entirely through his presentation. I was attempting to give my concept of the substance of what was said, and I will now demonstrate that my concept of what was said is not abusive at all of the language.

It says there, "Unless adequate supplies become available to meet the expanding demands of the market, many of the Com-

pany's customers, and Companies producing cellophane packaging machinery, will suffer financial loss."

That is just about what your Honor said. Now, does your Honor require me to read——

The COURT. No, but I think the next sentence qualifies the preceding sentence. That is all I had in mind. I do not want to make an issue of it.

Mr. GESELL. I don't either, your Honor. I am just trying to keep the record straight.

Mr. MINICUS. The next sentence covers everything we are going to discuss in this document. The next sentence says, "The Company, as the acknowledged leader in the introduction and production of celophane, has a definite responsibility to see that the market is supplied either by its own production or encouraging others to enter the business."

And I said right at the beginning, that is exactly what we are going to talk about, How did they do it? When I read it, I didn't look at it as a qualification at all. I thought I had already covered it.

9914 In this report, written in 1948, against this background, it was determined upon the foregoing facts, that the constant need for more cellophane should be met, and at the same time, duPont's percentages would be reduced substantially if a competitor would go into the business with a new 16-machine plant.

Then are set forth at page 9 the competitive conditions which would confront such a producer. Reading on the middle of last paragraph on page 9:

"With a smaller sales volume, the unit selling and management expense probably would be higher than for duPont, and the working capital might be higher. Nevertheless, it is not unreasonable to expect that, meeting duPont's present prices, a competitor could earn at least 10 per cent net return with a new 16-machine plant, built or acquired at present construction costs. The prospect of a 10 per cent net return might be adequate to induce a capable concern to go into the cellophane business. Opportunities elsewhere for a higher return at present construction costs are not plentiful."

So then we have duPont's statement that if a third producer does go in here, he can probably make a net return of ten per cent.

Then summarizing the effect of this document in its pre-
9915 sentation of the market position in 1948, several months after the complaint was filed, we see that the document is authority for the fact that the market was then short of supply by an estimated 20,000,000 pounds.

This and additional forecasted deficiencies were to be made up by expanding existing facilities. Cellophane had not been freely available for a great many years. Resultantly many products had not been aggressively sold. These included white bread, meat and produce. Because of allocations, salesmen were mere order-takers, and it follows from that that packagers were being forced to substitutes.

Now, thirdly, if capacity became available, a vast reservoir of demand could be drained by aggressive selling. This would be in the neighborhood of 500,000,000 pounds.

Fourthly, cellophane is essential to the civilian economy. The economic welfare of large groups of business people is dependent upon an adequate source of supply.

Fifth, consideration is being accorded at that time in the duPont Company to the introduction of a third producer. The statement is in the document that duPont's percentage would be reduced substantially thereby and that this competitor would have to be satisfied with a net return of 10 per cent.

Mr. GESELL. It doesn't say he would have to be satis-
9916 fied with 10 per cent. They estimate he could make ten per cent. It doesn't say what he would have to be satisfied with.

The COURT. Can you identify for me, Mr. Minicus, the offer of this document?

Mr. MINICUS. The document is preceded by a forwarding letter from Mr. Gladding, the director of the Development Department, to the Executive Committee, and the document itself is from the Development Department as a report to the Executive Committee, and on the last page we have, "Prepared by" Mr. J. L. Fahs and Mr. H. E. Ford, and "Approved by" Mr. E. K. Gladding.

The COURT. Who are those individuals?

Mr. MINICUS. My understanding is this: I have identified Mr. Gladding as the Director of the Development Department; and Mr. Fahs and Mr. Ford are people within the Development Department under Mr. Gladding, but in rather high capacity.

Now, Government's Exhibit 583 is a report by Mr. J. A. Mitchell, whom Mr. Gesell has identified as a previous witness in this case, under the sub-heading "Thin films outlook" and it is dated May 16, 1949. The purpose of the report is expressed in a statement appearing on the first page of the report:

"In recent years a number of new manufacturers have entered the thin films field, and the synthesis of polymers
9917 for films has become an important objective in the work in many research laboratories. It is timely to ask how this increased general activity affects the position of cellophane; and

if our program on cellophane and new films is headed in the right direction.

This report attempts to assemble available information which will lead to reasonable answers to these questions and point the way to the attainment of practical goals."

Now, we believe that from the general tenor of the remainder of the report, it is apparent that one of Mr. Mitchell's primary objectives is to ascertain and evaluate the impact of certain recently developed films upon the market for cellophane, and that this is in effect a market study resulting from the development of certain films.

Mr. GESELL. I simply say to your Honor that that statement is certainly an offer of the entire document. He asks your Honor to draw conclusions as to the character of this entire document. Previously he said he was making a limited offer of certain specific paragraphs and points.

Mr. MINICUS. That is a definite mis-statement. I am offering the entire document, if Mr. Gesell has any doubt in his mind about that.

9918 The COURT. Now, let's go back and see what occurred. I asked Mr. Minicus a question. I said, "What are the critical pages you want me to look at?" He numbered them off. But as I understand it, you are offering the entire document?

Mr. MINICUS. That is my understanding, sir.

The COURT. And there is an objection, and I am reserving ruling until you can show me the relevancy of the writing.

Mr. MINICUS. So, to reiterate and recapitulate, the purpose that we are after in this document is to ask how this increased general activity affects the position of cellophane, and if our program on cellophane and new films is headed in the right direction.

Now, in the course of accomplishing his purpose, lengthy discussion is accorded in the report of many of the films previously introduced into the case by the defendant. Such films include cellulose acetate, pliofilm, ethyl cellulose, Saran, Cry-o-rap, polythene, and the vinyl films.

Now, commencing at page 2 of the report, the writer describes various markets in which these films are to be found. He distinguishes the packaging market, the fabric replacement market, the electrical market, and several miscellaneous and minor markets, and these, he says, are all markets in which various of these films he is discussing are to be found. In this regard, the report
9919 clearly establishes that with the exception of cellophane, none of the films designated are confined to the packaging market exclusively, but in many instances are more important to the fabric replacement or the electrical or the miscellaneous markets with which the report is incidentally concerned.

The requirements which films must possess in order to successfully participate in the packaging market are set forth at page 32 in the following language:

"The market today demands a low cost film, with an attractive appearance. Cost on the package, which involves efficient operation on wrapping machines, is a critical factor. Sufficient stiffness to give crisp package appearance is needed. Transparency by promoting sales appeal, is usually an advantage and in many applications is a requirement. Sufficient durability for the intended use is necessary. Moisture impermeability is usually desired or, if not, at least water-proofness. Stability of film properties is important. Freedom from odor, toxicity, and usually taste, are required. Film thicknesses of one to two mils are usually used. Little or no re-use value is required; cellophane, for example, is strictly a one-use wrap. Re-use value may be important in packaging applications requiring a tough film."

9920 The stress on transparency in this statement is entirely in accord with the position which the government has been urging since the subject of substitutes was interjected into this trial. In that regard, the report is more material and relevant for what it admits to say, rather than for any statement contained therein, for whereas one of the primary inquiries is the maintenance of duPont's cellophane in opposition to material supposedly competitive with cellophane, not a single mention is found of any of the paper products such as wax paper, glassine, or sulphite.

9921 Here again a duPont document volunteers that broad differentiation which actually exists between the transparent and the translucent or non-transparent materials.

In further delineation of this market Mr. Mitchell states that cost is a critical factor. It has been established beyond argument at this trial that all of the other really transparent films have always sold and continued to sell at a price considerably in advance of that of cellophane, some as much as two or three times more expensive. It is difficult to reconcile statements to the effect these materials are in competition with cellophane with the fact that none has ever been sold within the price range of cellophane.

The COURT. But they are still sold, aren't they?

Mr. MINICUS. Yes.

Mr. GESELL. To point up our objection at this point I read you a question and answer from Mr. Mitchell. I again say he was not cross-examined. He is presented here as a market expert in this presentation you are hearing.

"Question: Your entire experience has been as a research man and you have had no experience with sales or sales development, or promotion?

"Answer: Yes, that is right."

Now, they take a document which they say they
9922 are not offering to impeach him and present it as a market study when on its face it is perfectly apparent it is the work of the Technical Division of the Cellophane Research Section of a man who on his direct examination was not challenged and who stated he had no sales or market experience. It points up the basis of the objection which I advanced to the court.

The COURT. For the purpose of the record would you give the page where that occurred?

Mr. GESELL. That appears at page 5469 of the ditto transcript and 4693 of the print.

The COURT. Let us take a ten minute recess.

(At this point a brief recess was had.)

Mr. MINICUS. I guess, your Honor, the only way I can meet the continuing objections here of this document is to confront them as they are brought up.

I want to make clear first that the basis for admissibility of this document is as an admission. Its purpose is not alone that of admission. Its basis of admissibility is that of admission, putting aside completely any basis of admissibility founded in impeaching statements or prior contradictory statements. This is an admission and the rules for a document going into evidence as an admission are certainly a great deal different than those of an impeaching question.

9923 The COURT. My difficulty, Mr. Minicus—and I may state parenthetically, my mind is still open on this question—is you had the witness on the stand and wouldn't it be essential fairness to confront him with the document?

Mr. MINICUS. That wasn't done entirely for this reason, your Honor: That none of the things in this document, particularly the things we are going to talk about here, was the major thesis of his testimony.

The COURT. What about the part of the colloquy that Mr. Gesell read just before the recess?

Mr. MINICUS. That was that he wasn't an expert on the market position, that he had no experience.

The COURT. You are using him and his utterances as an admission that he was an expert of market conditions. That is my difficulty.

Mr. MINICUS. I am simply stating that this is a vicarious admission of the duPont Company. This was not a private document that he wrote at home one night for his own amusement. I don't know what his position is in regard to this document.

The COURT. That is the point. When he was on the stand why didn't you question him about what his position was? What

validity can I give to this report when there is absent an examination of the witness as to his qualifications to make these
9924 admissions? The elevator operator at the DuPont Company could not make admissions as to markets.

Mr. MINICUS. The distribution listing on the back page, if you will look at the back page, you will see that this report must have been taken quite seriously. The distribution notification on the last page of this report indicates it went to executives in the Rayon Department at that time from Mr. Yerkes on down.

The COURT. Yet on direct examination his testimony, as quoted by Mr. Gesell, would seem to indicate that he was not qualified to make such admissions as are contained here.

Mr. MINICUS. If I may answer that. A document that I am about to put in at a later point, which is Government's Exhibit 586, which is saying by Mr. Kunsman, who is Division Manager of the Cellophane Division, and is addressed to Mr. D. F. Carpenter, who was then Assistant Manager of the Rayon Department and is today the Manager of the Film Department, Government Exhibit 586 which is written after this report, makes reference to it in this fashion:

"More accurate and up-to-date information was required on the impact of non-cellulosic self-supporting films and their potential and possibilities. This study was conducted by Jim Mitchell. The report, a most thorough and comprehensive one, is in the files."

9925 There is an adoption of this report by the top people in the company. If I had attempted to cross-examine Mr. Mitchell on the contents of this document for the purposes for which we are offering it, it would then have been objected to as beyond the scope of the direct examination.

The COURT. Would it in the light of the question that was put by Mr. Gesell on direct examination? Will you read that question, Mr. Gesell?

Mr. GESELL. "Question: Your entire experience has been as a research man and you have had no experience with sales or sales development or promotion?

"Answer: "Yes, that is right."

The COURT. That he had none of those qualifications.

Mr. GESELL. That he had none of those qualifications, and here they take a technical man's report and seek to distort it into a market study which it is not. He is entitled to answer that in all fairness in terms of ordinary trial procedure, and the burden is not on me to call him. The burden is on the Government to call him. I tended him once.

Mr. MINICUS. Your Honor, if you recall I didn't cross-examine Mr. Mitchell at all. It wasn't my desire to impeach Mr. Mitchell in any degree. Inasmuch as I control the course of the
9926 Government's presentation of a case, if I don't desire to impeach a man that is entirely my responsibility.

But I am not offering this document as an impeachment. I am offering it as a vicarious admission of a representative of the defendant corporation. I don't have to impeach him and if I don't offer a piece of evidence as an impeaching document but as an admission of the defendant it is admissible on entirely different grounds.

Mr. GESELL. Your Honor, our point on that is this: That if he is not qualified then the admission has no value and this is not an admissible document and it is not an admission. If he is not trying to impeach this testimony it is meaningless.

Mr. MINICUS. The document I read to your Honor from Mr. Kunsman to Mr. D. F. Carpenter showed his superiors thought he was qualified.

Mr. GESELL. Not to make a market study. There is nothing in the document which says he was qualified to make a study of the market. It refers to an additional study by a different person as having been made on that score.

Mr. MINICUS. One of these is more accurate and up-to-date information. That follows the one Mr. Gesell was talking about. Then it says, "More accurate and up-to-date information was required on the impact of non-cellulosic self-supporting films
9927 and their potential and possibilities. This study was conducted by Jim Mitchell. The report, a most thorough and comprehensive one, is in the files."

The COURT. When Mr. Mitchell was on the stand he denied he had any expertees on the subject matter under discussion. At that point why didn't you challenge him?

As Wigmore says in Volume III, Section 1025: "It has been already noticed that, to obviate the objection of Unfair Supplies, a natural expedient is to ask the witness, while on the stand under cross-examination, whether he made the supposed contradictory statement."

Mr. MINICUS. That is the Queens case where you immediately follow that up with a document to impeach him.

The COURT. You had that document in possession at the time he was on the stand.

Mr. MINICUS. We are putting this in as an admission of the defendant. Now, at Section 1051 Wigmore says the preliminary warning to the witness is unnecessary in the case of an admission. He goes on to say further there was a difference between a party's

admissions and a witness' self-contradictions. He makes the distinction and that is at 1051.

The COURT. You go on with your presentation. As I said, I will reserve ruling on the admissibility of Government exhibit 583.

9928 Mr. MINICUS. Now, we were discussing before the recess the requirements that Mr. Mitchell found for thin films in the thin film market. In addition to transparency and low-cost other characteristics which Mr. Mitchell finds to be essential to participation in the packaging market are durability, moisture-proofness, stability, freedom from odor, toxicity and taste, etc.

We intend to support our position previously taken with additional proof that no other wrapper possesses all these characteristics, that is, characteristics necessary to the purposes accomplished by cellophane. They don't possess them to the same extent that they have found in cellophane. In other words, that for a great many uses cellophane's versatility renders it unique as an all-purpose wrapper.

This position gains support from Mr. Mitchell when he states at page 1 of his report:

"The thin films business faces a bright future. Present markets are growing and expansion into new markets is likely. Cellophane has a firm position in this generally favorable situation. It has been successful because we have made it a versatile product with many end uses by solving the problems encountered in the packaging trade. With continued technical support, cello-
9929 phane may well continue the leader among transparent films."

The COURT. You are reading from what page?

Mr. MINICUS. Page 1, the first full paragraph after the heading, "Summary and Conclusions."

The COURT. Yes.

Mr. MINICUS. "It is not a foregone conclusion that this position can be maintained indefinitely, however, because quite conceivably, cellophane could be displaced by a new film lower in price and having cellophane's virtues in one or more respects. Synthetic polymers are available now which produce films selling in the cellophane price range, though there is none yet known which for packaging purposes is equivalent to cellophane in both properties and cost."

The defense in this trial has pressed for recognition of a packaging market while at the same time avoiding specific definition of the nature of the scope of this market. Any wrapping material which is flexible, regardless of transparency or cost or protective characteristics would seem to constitute a commodity present in this market.

The plan obviously is to augment a quantitative defense found to exist in this tailor-made market to a point at which cellophane reciprocally would be reduced to impotence as a factor of market control.

9930 The COURT. Wasn't the author of this document the head of research at the Richmond plant?

Mr. GESELL. That is right, your Honor. That is the man.

Mr. MINICUS. Mr. Mitchell also defines the packaging market but in far different terms. At page 10 of his report it is the following language:

"The packaging market is dominated by cellophane which is expected ultimately to reach a volume of about six hundred million annual pounds. There are some applications which require a film tougher than cellophane (better tear, flex and impact resistance) for example, in packaging frozen foods; heavy textile articles such as shirts, blankets, sheets, pillow cases, jackets; drugs and chemicals; hardware and metal goods. No other commercial film has successfully penetrated this area of the market because of inadequate properties or cost. Additional market research is needed to determine the size and requirements of the tough film market which should be large, certainly in the one hundred million annual pound class. Requirements for films in the packaging market as determined by cellophane experience are discussed in Appendix-B, page 32."

Now, the Government maintains that the nature of what this market is contains the crux of all the confusion which has been created in this case as a result of defendant's theoretical position.

9931 It should be perfectly clear that any distinct product of itself occupies a distinct market. That fact, of course, doesn't negative a perfectly obviously conclusion, that as market concepts are productive for whatever purposes that distinct product may also be found to exist in a series of augmented markets along with an ever-expanding group of other similar or diverse products. Thus green slate shingles exclusively occupy a market comprising on the one hand buyers desirous of using green slate shingles. However, other types of slate shingles undoubtedly exist. Perhaps they are red, blue, gray or green.

Now, all slate shingles being roofing materials for the purposes of certain specialized or technical discussion may be said to be in the same market with other products, that is, wooden shingles or tile shingles or asbestos materials and even tin and thatched roofs. But roofing is part of a more generic group known as building materials and so it could go on and on. As the particular market concept is enlarged any additional constituent members will be brought into the market place.

It is obvious, therefore, if the Sherman Act is to be accorded any efficacy at all a line must be drawn somewhere. In order to accomplish this necessary delineation it is requisite that recourse be had to more specific definition of terms. One of those terms
9932 which has been used repeatedly at this trial and used with myriad meanings is "competition." Here again depending upon the terminology of the science or art involved the term has various meanings. Economists differ among themselves as to the exact meaning of this particular term. It can be said that in terms of the expendable consumers' dollar, every commodity competes with every other commodity.

Within a narrower range, things of the same class or generic group are said to compete with other things within that class. Thus, strawberry ice cream is competitive with other ice cream flavors.

The Government, however, does not subscribe to the theory that strawberry ice cream is beyond monopolization. Let the total supply of strawberry ice cream become concentrated in a single source, if that were possible, let this concentration be to a degree that it is sold under more stringent terms or conditions or is in short supply longer than the other flavors of ice cream, I am certain many persons addicted to strawberry ice cream would be importuning the Congress or the Department of Justice for relief.

The COURT. You don't mean that, do you?

Mr. GESELL. Economically that is the most absurd thing that was ever said in a courtroom.

9933 Mr. MINICUS. I am simply bringing this down to the most refined point. There is no difference for that matter. I am talking about things which are of the same nature that fits within a small generic class. That is not the position in this case at all.

The COURT. Is it or is it not your position?

Mr. MINICUS. I am coming to our position in a moment. We do seriously assert that even among things of the same generic class, that is, the same thing, it is possible to monopolize a member of that class.

On the other hand, for certain purposes things that are not of the same genus or type are sometimes loosely termed to be in competition.

An apt illustration may be found in the use of fuel oil and natural gas for heating purposes. These products perform identical functions and in many areas sell within the same price range. To conform with the theory presented by the defendant, it would become incumbent upon the plaintiff to establish dominant control of all sources for natural gas as a condition precendent to a finding of monopolization in the fuel oil markets. Such a con-

clusion, we believe, is ridiculous and as such the principle has never been upheld by any court.

The contention of the Government here is best illustrated by the facts of an adjudicated case. The Aluminum Corporation
9934 of America offered evidence in defense that its virgin ingot was confronted by competition from (1) secondary aluminum, a substance of the same generic class, both aluminum, and (2) from other metals comprising completely different classes, to-wit, copper, iron and zinc.

The court in the Second Circuit discarded both of these contentions, although it admittedly experienced greater difficulty disposing of secondary aluminum, where the alleged competition resulted from a product of the same generic class.

This is our position. The alleged market competition offered by the defendant does not even result from conflict in the market place between materials of the same class. Cellophane is regenerated cellulose, a transparent product; glassine is a translucent fibrous paper; pliofilm is basically rubber; aluminum foil is a metal. About the only characteristics these have in common is that they are all flexible.

The COURT. Don't they have more functional use?

Mr. MINICUS. It depends on where you draw your line, and that is not the point. We have drawn it a long time, your Honor. It is where you want transparency at low cost with adequate protection, or where the buyer wants it. The buyer and his desires make this market.

I was about to say if we accept the premise that it is
9935 necessary to draw a line demarking the periphery of the market for a distinct product in order to effectively enforce the Sherman Act, and further accept the obvious fact that the position of this line must be determined according to precise definition of certain terms in commercial usage, then the question arises, what authority is to be resorted to for such definition?

9936 The testimony here does not appear to employ such commercial expressions as competition with the same connotation and, as I stated, professional economists, because of broad intramural ideological ideas of interpretation can't help us either. Therefore, we must inevitably return to the position which has been maintained by the Government since the interjection of the issue of substitutes, that the only authoritative source for definition of terms within the Sherman Act is to be found in the adjudicated cases.

This position, of course, raises issues of law and admittedly the present phase of this trial is devoted to the resolution of certain issues of fact. Now, treated as an issue of law, the Government has no compunction that its position will ultimately prevail.

However, as an issue of fact, we are still willing to confront the defendant within the terms of their own vocabulary in order to demonstrate that the theory of substitute materials is absolutely specious factually.

Now, among the authorities supporting our contention on the factual side is again Mr. Mitchell's report. In the second paragraph, at page 12, he ascertains that as a merchandising medium, cellophane has unique characteristics. I quote:

9937 "As a merchandising medium, cellophane has capitalized on transparency, protection and low cost. As a barrier for packaging, moistureproof cellophane is really a combination of two films with unique properties, a cellulose base insensitive to organic solvents, waxes, and greases, impermeable to gases and most odorous materials, with a nitrocellulose wax coating impermeable to water. Versatility has been incorporated into cellophane by taking advantage of this structure in developing within the confines of the cellophane process, specific ranges of properties, such as moistureproofness, to meet different requirements of the packaging market. This in no small measure has been responsible for the successful growth of the cellophane business.

"Packaging machinery designed for cellophane has reached a high degree of perfection and at the present time no other transparent film can be handled with an equal degree of efficiency."

Considerable testimony has been introduced by the defendant which is designed to establish that cellophane has been tried as a wrapper on a number of particular products, and subsequently has been displaced by these other materials. From the confusion just engendered by this evidence, an inference has obviously been sought to the effect that this displacement manifests competition. With regard to this point, the Government is again in

9938 accord with Mr. Mitchell's statement, this time beginning at the bottom of page 14, to wit:

"There are good reasons for bringing new films on the market.

"First, large and growing outlets exist which cellophane is not capable of filling. There is room for (a) a low-cost, tough, water-insensitive transparent film with high water vapor permeability for packaging heavy textile articles, or wet-goods, such as fresh produce and large meat cuts.

"(b) A low-cost, tough, transparent film with low water-vapor permeability for packaging hardware, metal goods, drugs and chemicals".

Then skipping the next paragraph.

"Second diversification of our films business is desirable because:

"(a) to keep healthy, cellophane, while still in the growing stage" should be forced into uses for which it is best suited.

"(b) A well balanced family of films, with a minimum overlapping of properties will maintain a stronger sales position and give customers sound economical service."

Now, in line with that reasoning, neither does the Government maintain that for all purposes on all products, cellophane is
9939 the ideal wrapper. The proof already adduced conclusively establishes that on such products as chocolate candy bars, bulk cuts of meat, and certain cheeses, cellophane is totally unfit as a wrapper.

On the other hand, when a manufacturer desires to package a product which is adaptable to cellophane in a transparent wrapper at low cost, with adequate protection, there is no other material now on the market possessing the versatility to adequately satisfy his requirements.

The COURT. Well, is it your thesis that if the defendant had kept its prices up instead of lowering them, it would not be violating the anti-trust laws?

Mr. MINICUS. No, sir.

The COURT. Well, suppose cellophane sold for the same price as pliofilm, for example.

Mr. MINICUS. We have not conceded at all, your Honor, that the characteristics——

The COURT. We are asking for a short definition now, and that is what I want. Is it the low price that caused the defendant to violate the anti-trust laws?

Mr. MINICUS. Absolutely not. There are three factors here, and it has been the attack of the defense, and that is where we believe that the picture has been distorted. You cannot take price in vacuo, nor can you take protection in vacuo, nor can you take transparency in vacuo, nor can you take eye-appeal in vacuo,
9940 nor can you take low price in vacuo. The things are all interrelating functions that put this thing in a unique market by itself. In other words, there is no one thing.

The COURT. I get your point.

Mr. MINICUS. I have just about come upon the statement, and I guess this would be an answer to the position I am presenting here, to the statement I just made here.

If this Exhibit accomplishes nothing else, it at the very least emphasizes the existence of the transparent packaging material market, and stresses the broad distinction between that market and the markets in which opaque, translucent, or semi-transparent wrappers have acceptation.

The unanimity with which all documents emanating from the duPont Company accomplish this differentiation is astonishing. Whereas on both the facts and the law the Government insists that the criterion for monopolization in this case exists in the market

for cellophane, we do not deny the existence of a transparent packaging materials market. Nor do we deny the existence beyond that of other broader and ever growing markets with more products coming in as you increase the concept.

Now, although that market is somewhat more inclusive than the cellophane market, it is undoubtedly closely related to it. However, when the defense attempts to expand its base beyond the limits of the transparent materials, their position is weakened by recourse to such an absurdity.

3941 If the major issue of this case extended to monopolization of the transparent wrapper market, which it does not, even then duPont's dominant position would be diluted by a very small degree. This fact is already in the record at page 4916 in the form of a concession by defense counsel when he stated, "It is perfectly clear that these various films, like polythene and saran and items of that kind account for only 2% of the packaging materials that were shown in Mr. Bricker's schedule."

The relative insignificance in the market place for such films as pliofilm, polythene, cellulose acetate and the vinyls is graphically illustrated by a chart at page 9 of the Mitchell report. This chart sets forth the annual sales of the films I have just mentioned, both collectively and severally. The solid line running up through the chart in the middle there, beginning in 1924, shows cellophane and it is indicated by an arrow: then above that a line begins to develop in 1933, and it shows the sales of the other films that we have mentioned. This chart shows the annual sales of these films, collectively and severally and compares them with the annual sales of cellophane. In addition, these sales statistics are projected on a forecast basis through the year 1958. It will be observed that quantitatively the sales of other transparent films relative

3942 to cellophane sales are fairly insignificant. That is the sales of all these films that are represented here.

A tabular presentation which follows on page 10 illustrates that sales of 8 other transparent wrapping films—and they are listed there, all the way from cellulose acetate through pliofilm, polythene, vinyls, saran, polystyrene, ethyl cellulose—the sales of those eight other transparent wrapping materials represent only 60 million pounds in comparison with 204 million pounds of cellophane sold in 1948.

Now, here is the point: It is further interesting to note that duPont's forecast for the period 10 years thereafter does not significantly alter this ratio; and in addition, whereas virtually all of the cellophane poundage was consumed as wrapping material only fractions of the sales of the other eight materials were devoted to that purpose. They went into the other markets that Mr. Mitchell was talking about as well. Thus, for example, the

...which we are the largest one on the chart here, the ...style, which represent [illegible] pounds of the [illegible] pound for all other kinds [illegible] eventually to usage in the packaging industry. Another table in support of this conclusion is found at page 12 of the report.

Now, when the author of this report addresses himself to recommending a future policy for duPont in the field of cellophane, the comments become especially pertinent for the ultimate disposition of this case.

At page 28 he estimates that by 1958 cellophane sales will be [illegible] pounds, of which duPont's share is expected to be [illegible] pounds, or 50%.

In Appendix F attached to the report he goes into considerable detail with regard to the mechanical means by which this expansion can be accomplished.

Finally, at page 2, a very interesting observation is found, and this appears to be Mr. Mitchell's recommendation for future expansion. As a plan for action during the next 12 to 18 months, we should squeeze as much production as possible from existing facilities, after which for about three years, the growing cellophane market should absorb increased production from American Viscose and a new producer. By 1958, on plans for additional capacity should be formulated, tested and ready for plant installation.

Now, Government Exhibit 587 is titled, "Survey of Cellophane, [illegible] Economics and Competition."

Mr. [illegible]. May I inquire whether this completes the discussion on that?

The Court. I was just going to ask that.

Mr. Minard. This does complete the discussion.

The Court. I think before you start, Mr. Gesell, with your comments on it, we will recess for lunch.

Mr. Gesell. I don't intend to comment now, your Honor. I am going to wait until he gets through some section of something.

Mr. Minard. This isn't the whole section. Just that document.

The Court. Just the Mitchell document?

Mr. Minard. Yes.

Mr. Gesell. I did want to point out, so that the record is clear, he has not referred to references on 16 of the pages which he said he was offering for specific purposes, so we don't know what it is on those pages he has in mind.

The Court. Very well, let us recess until two o'clock.

(At this point a recess was taken until 2:00 p. m. the same day.)

9945 2:00 O'CLOCK P.M., THE SAME DAY

(Present: As before noted.)

Mr. MINER: Now, Government exhibit 587 has been admitted in evidence and is impounded document in the clerk's office number 46 and is entitled "Survey of Cellophane Future Capacity, Economics and Competition." It was a report written by representatives of the Technical and Cellophane Division which was issued on February 16, 1950. Part 1 was issued at that date. Part 2, which was comprised largely of certain plans that were drawn up for expansion of the cellophane plant of the DuPont Company was submitted on February 28, 1950.

Our primary interest here is with part 1 of the report. Before passing on that and along with the description of the report I would like to point out that at the end of the report there is a bibliography and under the heading "General" the first document mentioned in this bibliography is the Mitchell report on Thin Films Outlook that we have just considered.

Now, with regard to Government exhibit 587, the purposes of this report are expressed on page 2 and stated to be three-fold as follows: "To determine what is the future cellophane market and how duPont can supply it best. Secondly, to determine what will

9946 be duPont's cost and investment position as it chooses to fill none, part or all of the increased demands and how duPont's position will compare with that of competition. Thirdly, to determine what duPont should do and when it should do it to assure duPont the best profit position over the probable life of the cellophane venture."

The existence of a market for cellophane, qua cellophane, is recognized by a graph appearing on page 4 of this report. It will be observed that this graph is projected against the time period beginning in 1923 and continuing through the date of the report, 1950, and into a forecast of the cellophane market as of the year 1965 and it will be observed that right in the body of the graph is the description cellophane market.

This statistical presentation presumes with regard to the forecast that American Viscose will ultimately achieve its alleged goal of one hundred million pounds capacity. We can see that set forth graphically in the top extension of the chart. And that Olin will some day expand to sixty-six million pounds, and that sixty-six million pounds is presented there so that the American Viscose potential and the Olin potential are presented also as a unit with just the difference in the direction of the lines indicating which is which.

DuPont's participation in this market, it is estimated for
9947 purposes of the chart, will remain static at a capacity of 210,000,000 pounds. That is presented by the straight line right across the chart from the year 1950 on.

The evidence already reveals that, as of the present time, duPont has exceeded this capacity of 210,000,000 pounds and is now at 218,000,000 pounds. At any rate, upon the basis of these assumptions, it is estimated that by 1955 there will exist an unfilled demand of approximately 160,000,000 pounds, and that is shown by the white area on the chart between the duPont's capacity and the capacity of the other two producers.

The remainder of the report considers whether and in what manner expansion shall be accomplished by duPont with regard to this unfulfilled demand. As I stated before, plans are presented in part II of the report for investments, plans and calculated costs necessary to an additional capacity of 149,000,000 pounds.

The subject matter of the report then switches to a consideration of economic factors attendant upon this proposed or considered expansion. A table at page 6 compares investment, costs and earnings statistics, after expansion, and the comparison is with the current financial data.

Operative earnings with production at 195,000,000 pounds,
which were approximately what they were at the time
9948 of this report, are shown at $27,000,000. In order to determine net earnings from this base of operative earnings, 43% is deducted for taxes and 7.7% for all other expenses. This leaves net earnings of $14,000,000 and a net return on investment of 20%. That is today's statistics. After the proposed expansion it is estimated that this net return, after all expenses, will increase to 25%. Earlier evidence will be recalled which indicated that the best return a new manufacturer could expect to realize would be in the neighborhood of 10%.

The next ten pages of the report, beginning at page 7, are addressed to the competitive position of duPont cellophane. The study is broken down into two sections, as follows: 1. Competitive position of duPont cellophane as against cellophane from other sources; and 2. competitive position of duPont cellophane against non-cellophane films.

The Government's discussion of this evidence will follow that breakdown. However, prior to a consideration thereof, it is interesting to note again that throughout the entirety of this lengthy discussion of competitive position in cellophane, at no place is there a consideration of any of the paper products as a competitive with cellophane.

Mr. GESELL. He has skipped the chart on page 3 which
9949 shows that in graphic and great detail. You will see on page 3 above the chart a study showing how the potential was achieved in uses where cellophane now renders satisfactory service. They have taken every use where they have any customers in that use and projected that total of all others on the assumption of the business they will do. If you run down the column you have bread and cake, fresh produce, crackers and biscuits, meat, you will see representation graphically of the substantial potential that is held by these other materials.

Mr. MINICUS. Shall I answer that?

The COURT. Could I ask for a point of information?

Mr. GESELL. Yes.

The COURT. We will take the first item of bread and cake and we will take the white portion of the bar. What does that represent, duPont's contribution to the industry?

Mr. GESELL. The white portion is what they could get if they sold all the bread and cake business as of the dates indicated.

The COURT. What does the black portion indicate?

Mr. GESELL. That is what cellophane has. 1949 sales are that much. The 1950 forecast is the middle part and the potential is computed as of January 1950. That is what they think the total business will be for cellophane and all other materials in the bread and cake business.

9950 As is explained by the text immediately above it, that situation runs down through fresh produce and the others. They have, at the beginning of the presentation, dealt with that subject.

Mr. MINICUS. In the first place, your Honor, I challenge Mr. Gesell to show me on page 2 or anywhere else on this report or in connection with this graph where wax paper is represented or stated to exist or any mention of wax paper or of glassine or of sulphite or anything else. These are figures, for example, here in the bread and cake industry, that duPont could possibly get up to.

In the first place, the Government contends that that raises a matter of displacement, which is not competition. If the displacement is permanent like it has been in cigarettes, they displaced glassine in cigarettes 20 years ago and it never came back again. That is the end of it. They are talking about potential. They are not talking about competition.

In the second place, there is no indication for any of these products whether they are wrapped in wax paper, glassine or sulphite. Your fresh produce, we know a great deal of that is sold unwrapped. The same thing applies to meat and for many other items on here.

Those white lines do not indicate that that is a potential wrap in these papers, nor does it indicate any competition.

9951 But if we turn back to page 7 we find there a statement of competitive position against cellophane, and then we go on for a few more pages and we find another heading, "Competitive Position of duPont Cellophane Against Non-Cellophane Films." There, where they are talking about competitive position, at no point do they mention any of the papers.

9952 Now, with regard to competitive position against cellophane, beginning on page 7. "In the consideration of duPont's ability to compete with cellophane manufactured by others, the criteria of duPont's economic power is found to exist in this report in relative earnings. The power to compete, according to this report, exists in the relative earnings of duPont as a manufacturer of cellophane and as of the others as a manufacturer of cellophane. That is the measure of economic power they have. This proposition is presented at page 8 in the following language:

"Since our quality must equal that of competition and since their quality will likely equal ours, our relative competitive position will depend upon our respective abilities to make a return at a price."

Then a table at the bottom of this page indicates that the strongest possible competition in cellophane ascertainable in the future will only realize a net return on investment 7 per cent below that obtainable by duPont after its proposed expansion.

Then, in the next paragraph, appearing on page 9, it is tacitly admitted that this advantage—and this is the crux of the case, I think, your Honor—this advantage is attributable to the economic power which duPont has been able to concentrate in the market place, rather than to lower manufacturing costs. And what

9953 is my authority for that statement. The language is:

"Our cost operating as we do now, is $.05 per pound higher than competition, and we will still be $.02 per pound higher than competition when we expand. Our return, however, at today's cost and price will be 2% higher than the best competition can expect, and after expansion it will be 7% higher than competition."

Mr. GESELL. Those are cents per pound, your Honor, not percentages.

Mr. MINICUS. I will re-read it to satisfy Mr. Gesell.

Mr. GESELL. I don't ask you to re-read it. I simply want to point out to the Court you have misread it.

Mr. MINICUS. Then I shall read it right, Mr. Gesell.

Mr. GESELL. While I am on my feet, your Honor, I think I might also mention that your Honor and I may have been talking at cross purposes about this chart.

The COURT. You mean at page 3?

Mr. GESELL. Yes. Because you have a negative and I have a positive, and when you asked about the white line, I was looking perhaps at a different line than your Honor was, because what appeared as white on yours appeared as black on mine.

The COURT. That is why I was a little confused.

9954 Mr. GESELL. That is the kind of case we have been dealing with on rebuttal.

Mr. MINICUS. The reason for that is that we have been using duPont documents, not our own documents.

Mr. GESELL. Let me therefore revise my statement by saying that your Honor's reference to the white portion in the negative, which is black on the positive, represents the sales of cellophane in 1949, industry sales of cellophane, against the total bar, which is the potential, taking into account all wraps for 1950.

The COURT. That is what I thought it meant, but I was a little confused.

Mr. GESELL. I am sorry we have different documents.

Mr. MINICUS. These documents are impounded and were provided by the duPont Company and there is nothing we can do about it. If we had done it, they would have been done right.

The COURT. What was that last remark?

Mr. MINICUS. If we had done them, they would have all been one color.

Re-reading, in response to Mr. Gesell's objection, to show that the economic power which duPont has been able to concentrate in the market place is attributable not to lower manufacturing costs, but to this high rate of return, the language in the report is:

"Our cost, operating as we now do, is $.05 per pound
9955 higher than competition, and we will still be $.02 per pound higher than competition when we expand. Our return, at today's cost and price, will be 2% higher than the best competition can expect and after expansion it will be 7% higher than competition.

This sub-section of the report, that is, competition between cellophane and cellophane, concludes at page 10 with the following statement:

"With this possibility for return, duPont's outlook against cellophane competition looks good, even when we make the unlikely assumption that a new competitor could have the advantages of starting from scratch in a new 55,000,000 pound plant, unburdened with any less modern capacity."

The next sub-section of the report is devoted to the competitive position of cellophane against non-cellulosic film. It is constructed upon a premise that no film presently known is in direct competition with cellophane. In other words, the respective mar-

kets are not co-extensive but merely touch marginally. The language is found at page 10 and is as follows:

"An analysis of the position of cellophane against non-cellophane competition is not a matter of simple and direct comparison because, while non-cellophane and cellophane films markets overlap, prices are different, and the combinations of useful properties in the non-cellophane films are by no means identical with
9956 those of cellophane. This holds for acetate films, which is clear, pliofilm and polythene, which are tougher, and saran, which is more moisture proof. The difficulty of comparison will continue until some other film can do cellophane's entire job, or until another film reaches cellophane's cost.

Until then, non-cellophane films will attack cellophane marginally, and find markets peculiarly their own as they do now."

Assuming then the non-existence of direct competition between cellophane and films presently in existence, the report then goes on to speculate upon the probabilities of competition from films not yet in existence. At page 11 the basis for this is said to be, "* * * * assuming a process and plant using all the advantages in operation that a number of polymers now offer singly, but which no single polymer yet has."

Pursuing this line of economic research, a graph at page 12 illustrates that the cost of materials available for immediate prospects cannot be brought within the range of cellophane costs. Thus it will be observed that in terms of the most optimistic forecast, the cost of materials for such films as ploythene, cellulose acetate, nylon, and the various vinyl films, cannot be brought down to the level necessary to get within the range of cellophane costs.

With regard to future prospects of competition from
9957 other films, this section of the report concludes at page 16 with the following statement:

The COURT. Before you pass page 12, will you look at that chart?

Mr. MINICUS. Yes, sir.

The COURT. Go down two blocks from the lefthand corner and over one. What is that product?

Mr. MINICUS. That is polystyrene. It is a product that is discussed in this report at a subsequent place. On the next page you will find the answer to that, sir, page 13, the 3rd full paragraph:

"Polystyrene price falls almost directly on the plotted line, indicating that if it could be cast into film at the speeds and efficiency and in the plant, we have assumed, it could be made at cellophane cost. Actually it sells today in a specialized market at $2.00 per pound. We do not know why the price is so high, nor how low it can actually go. In properties, it is one of the most brittle of films, and not a competitor for cellophane in its present form."

The COURT. That was not the product I had in mind. It is at the top of Figure 4, the second block down, and one over. I can't read it on my copy. It looks like heva.

Mr. MINICUS. Yes. That is one of the polymers that probably is in the research stage. We are not familiar with any commercial development of that film.

9958 The COURT. It was simply curiosity on my part, because I had not heard of that product before.

Now, you were at page 16.

Mr. MINICUS. Yes, sir. And at this point we are discussing the future prospects for these competitive films. It reads at page 16;

"The final question on competition is the possibility of new undiscovered polymers, which we and others are searching for, which might have competitive properties, and might fall in the competitive price range. Will they be many or will they be few, though it is foolhardy to predict a figure below which a price could not go, we think that they will be few. To get into the very low cost range will require volume production which in turn required that any polymer must develop a market unique in its own until it gains volume and lowers price so cellophane can be attacked.

"Without question, developments in the non-cellophane films for cellophane markets should be carefully watched. There is no visible reason, however, why we should hesitate to support cellophane as a virile business, into the foreseeable future.

"The evident conclusion from the foregoing facts, and speculations is that duPont cellophane business will continue to earn an attractive return on its present capacity and on the expanded capacity that present cellophane markets will probably need. . . .

9959 for a new money investment of $.39 per annual pound, including working capital on which we will earn 28% net return, we can obtain up to 149,000,000 of increased capacity from our present plants, as the market requires it. At the same time, we will reduce cost of sales by $.03 per pound and improve the net return on total cellophane investment from a current 20 per cent to an ultimate 24 per cent.

When thus expanded we can earn a better return than the competition we can now see over nearly all the price range that severest competition might dictate."

Now, that the market expansion anticipated by duPont in these reports consfitutes more than wishful thinking is established by Government Exhibit 586. After discussion of the various reports which we have previously considered here, the document states that the proposed expansion has already commenced. The language is as follows—this is impounded document #52 and the

paragraphs there headed (a) (b) and (c) discuss various of the reports, and then we come to the conclusion as follows:

"The results of the above studies have as of this date resulted in our securing authorization of a project, Part 1, for an increase at Spruance of approximately 10,000,000 pounds per year. We hope not later than March 15 to submit a project covering the conversion of one casting machine to multiple sheet casting, this being the root clearly indicated and agreed upon to take in order to increase our casting room capacity. We also have
9960 assigned the work to the logical organization to assure that the correct and proper answers will be available when necessary, in keeping with an orderly expansion of our existing plants to take care of trade requirements."

Then Government Exhibit 588, along the same lines of discussion, demonstrates the continuance of duPont's dominant position in the field of cellulosic bands, according to this report, as recently as 1950. Thus, at the end of 1949——

Mr. GESELL. Are you going to offer this?

Mr. MINICUS. I thought I had. If I have not offered it, the Government now offers Government Exhibit 588, an annual market analysis, Cel-O-Seal bands, dated February 7, 1950, submitted by Mr. Nulse to Mr. Haley.

("Document entitled 'Annual Market Analysis Report,' Cel-O-Seal bands, year 1949 and Prior years," dated February 7, 1950, from Mr. Nulse to Mr. Haley, was received in evidence and marked Government's Exhibit No. 588.)

Mr. MINICUS. This Exhibit demonstrates the continuance of duPont's dominent position in the field of cellulosic bands. At the end of 1949 duPont controlled 64 percent of the total supply available, leaving Celon and Sylvania with 31% and 5% respectively. It will be noted, of course, that duPont's position has declined approximately 6% from that which it held in 1946.
9961 This decline is attributed almost entirely to the fact of the discontinuance by duPont of the manufacture of cellulosic, all of that business having been taken over by Celon. Thus, because Celon's statistics, as presented here include its sales of caps, duPont's share of the market has decreased proportionately.

As a continuation of the same subject, your Honor, I would like to turn now to consideration of duPont's power to set arbitrary and non-competitive prices.

The Government offers in evidence Government's Exhibit 589 at page 7530. This is a letter from Mr. R. R. Smith, to Mr. Ladd, dated June 8, 1951.

(Letter from Mr. Smith to Mr. Ladd, dated June 8, 1951, was received in evidence and marked "Government's Exhibit #589.")

Mr. MINICUS. The Government offers in evidence Exhibit No. 590. This is a table of comparative prices. It simply is an extension back of a table that the defendant offered to show their position with regard to comparative prices.

The defendant's table began in 1946 and continued on to the present date. This table begins in 1929 just before Sylvania got into the field and continues up to the time of the defendant's table.

Mr. GESELL. We have objections to this table, your Honor. I don't know whether they ought to be heard now,
9962 or whether you want to wait until the rest of this offer is in. It makes no difference to me.

The COURT. I think I might as well hear you now.

Mr. GESELL. Well, our objections are these, your Honor. They are addressed to #590, and they go to the accuracy of it and the incompleteness of it.

The date, 12-31-29 on page 7534 is not supported by any price list to which reference is made.

Under the date 11-1-30, there is a failure to show Sylvania prices correctly for two types of film.

On the next page there is a failure to show a proper price for duPont under the date 5-2-32.

On the next page the date 10-1-37 is the wrong price list; it is a jobber price list, not a new price listing, and therefore, the inclusion of that column is entirely inaccurate.

Under 10-30-39, the discount levels shown are wrong, both as to date and as to amount.

With respect to the entire discount schedule for converters shown throughout the three pages of this schedule, there is no underlying source material shown of any kind and these cannot be developed from the sources.

In addition, the Exhibit is misleading in that it seeks on various occasions to create the impression that on the same date price
9963 lists were issued by both of these parties, when in fact they were not, but were issued only by one.

Now, those are some of our principal objections to this exhibit.

Mr. MINICUS. I submit in regard to this Exhibit, your Honor, that this Exhibit is nothing more nor less than an extension back of an Exhibit submitted by the defendant. If the defendant had wanted to show the whole exhibit, they would have done this job themselves. They started, probably to suit their own purposes, with the year 1947. We are only offering this Exhibit to carry the whole story back.

Mr. Gesell has nowhere stated exactly where these discrepancies in price occur. We have tried to check the price lists very carefully on several occasions. Certainly the things that he has

pointed out, you will notice, are indicated on the back page by footnotes.

It is a simple chart that is exactly in accord with the chart that they put in according to form and everything else. That is why we use it that way.

Mr. GESELL. The trouble is, your Honor, it is false.

Mr. MINICUS. Then yours must have been.

Mr. GESELL. It is not supported by the source material in the particulars I have indicated, and I object to putting in that
9964 kind of an Exhibit. If they want to put a witness on the stand, there he is right there, the man who prepared it. I will examine him on these on voir dire and we can get it straight. He sits right there, the fellow who prepared it, right at the counsel table of the plaintiff.

Mr. MINICUS. Why don't you put him on?

The COURT. I am going to allow the exhibit in evidence, subject to the infirmities noted.

Mr. GESELL. Well, your Honor, there is no proof——

The COURT. That goes to the probative value of the document.

Mr. GESELL. How is that to be shown, your Honor.

The COURT. You have indicated it very specifically, where the infirmities lie in the instrument.

Mr. GESELL. But this will be cited to your Honor as proof of converter and fabricator discounts, and there is no proof in the record of them, and they are false as to amount. Why should an Exhibit like that come into the evidence?

Mr. MINICUS. There is proof in the record on all of these things, on the price list already in the record.

The COURT. I understood you took out designated columns which you said contained defects.

Mr. GESELL. No. The whole showing as to discounts across the entire body of the three schedules. I am sorry, your Honor,
9965 to be so insistent, but this is not an accurate summary and I challenge its authenticity. I should be entitled to question the man who prepared it, against the source data.

The COURT. In the face of this objection, Mr. Minicus, I think that you will be required to establish the master facts, upon which these figures rest.

Mr. MINICUS. In that event, your Honor, as I have explained, I don't anticipate any objection. We had had no notice of any of these objections that have been made here today—if I had had notice of it, I would have withdrawn the Exhibit. I don't care about it. Our studies are already in to show this price identity. There is no question about it. We simply did this to carry back an exhibit of the defendant. I really have no interest in that exhibit.

The COURT. Very well, proceed.

Mr. MINICUS. We offer in evidence Government's Exhibit 591, a letter from Mr. Kunsman to Mr. Shackelford. This appears at page 7538 of the bound volumes. It is dated May 27, 1948.

(Letter from Mr. Kunsman to Mr. Shackelford dated May 27, 1948, was received in evidence and Marked "Government Exhibit #591.")

Mr. MINICUS. The Government offers in evidence Government Exhibit #592, appearing at page 7541 of the bound vol-
9966 umes. This is impounded document #29 in the Clerk's records, and it is a letter from Mr. D. F. Carpenter to Mr. Kinsman, dated July 7, 1950.

(Letter from Mr. Carpenter to Mr. Kinsman dated July 7, 1950, was received in evidence and marked "Government's Exhibit 592.)

Mr. MINICUS. Now, the Government has charged and offered evidence to prove that price competition has been nonexistent in this industry. We have supported our position with evidence to prove that cellophane is available to purchasers of that material at one price only, and that, a price arbitrarily set by the defendant in this suit. Such variations of price as have existed, particularly since the filing of this lawsuit, have not been shown to be significant, but, instead, are minor departures from the norm. The Government's position in this regard is further supported by this letter written as recently as June, 1951. In government Exhibit 589 is to be found the following statement:

"Because cellophane is the predominating factor in our business, the following information is applicable to that product primarily."

Then, immediately after that statement, under the heading, "Cut Price Competition":

"There is no cut price competition on transparent films in our business. Film manufacturers operate on the basis of pub-
9967 lished price lists and do not deviate from them. In normal times Viscose films are usually the same price."

Now, that is all that we are trying to establish, whether it is in a chart form or anything else, that there is just one price for it, and here it is unequivocally stated in this letter, written three years after the suit was started.

Now, GX 589 is a noteworthy document in another respect, and that is, it is one of the few duPont documents which takes cognizance of the paper products, wax paper, glassine, greaseproof, vegetable parchment papers, all of which the Exhibit states are lower in price than cellophane.

Now, what does the document say about these paper products?

9968 A statement is contained in this document after showing that the price is different: "We don't meet this price competition. Rather we compete with these materials on the basis of establishing the value of our own as a factor in better packaging and cheaper distribution costs." Please note this, your Honor: "And classify as our logical markets those fields where the properties of cellophane in relation to its price can do a better job for the user."

I submit that is exactly what I said this morning. That is exactly what the Government has maintained from the beginning, that the logical market for cellophane is the market in which it can do a particular job at a price, to wit, the cellophane market.

The document also goes on to talk about the other transparent fields and has this to say——

The COURT. What page?

Mr. MINICUS. At page 3 of the document.

Mr. GESELL. And also at the top of page 2, your Honor.

Mr. MINICUS. "In the case of competition from other transparent films, most all of those in the non-viscose group such as Pliofilm, Saran, etc., are higher in price. However, they have functional qualities which are different from cellophane and

9969 certain advantages against which we must compete. In short, the markets for cellophane are those markets where its functional qualities and published prices best permit it to compete and the progress in our business has been made primarily by filling the values of our film in relationship to what the user could afford to pay for them."

Now, the defense has attempted to refute to the Government's evidence that duPont has fixed arbitrarily non-competitive prices for cellophane in the main by categorical denials of allegations in the complaint and in the trial brief. In contra-distinction to this the Government maintains that it has placed in evidence detailed proof of the existence and exercise of this power. The details of two additional and recent manifestations of this power have come to our attention.

In Government Exhibit 591, the first three paragraphs discuss three separate price increases effectuated by the defendant during the year 1947. The first price increase that was made in 1947, the document prevails, was achieved through discontinuance of the quantity discounts to direct buyers and the reduction of the converter discount. That is all right. You cut that out but it did result in a somewhat higher price for cellophane.

9970 The second, in May 1947, resulted from increasing the gauge of cellophane. This caused a price advance on the

basis of yield of about 7½% over the previous price. The third price increase was announced in a price list issued on October 1, 1947, and brought about an additional increase in price of 7%.

The Government has consistently sought to focus attention on the very close relationship between the power to set non competitive prices and the reflection of those prices in a consistently high rate of return. The operation of this relationship is illustrated by the last paragraph of page 1 and the first paragraph of page 2 in the exhibit we now have under consideration. There it is stated:

"The operative return from cellophane sales to date this year is 24.3%. On completion of projects authorized for increased tonnage we will have an annual poundage of approximately 187,000,000 pounds and should be producing at this rate about October of this year."

Continuing to read:

"A forecast of operative return on $65,000,000 total investment to produce approximately 187,000,000 annual pounds, using the increase in salary, wages and materials, is about 31% at capacity operation with present selling prices."

9971 In a table immediately following that statement there is set forth duPont's operative return over the ten-year period from 1937 to 1947, and it will be observed that the operative return there shown has always been considerably in excess of 25% except for the year 1947. It will also be noted that the operative return to the date of this letter, May 27, 1948, is 24.3% and that the return forecast for 1949 is 31%.

The COURT. What is operative return? I don't clearly understand that.

Mr. MINICUS. Operative return is the earnings to the duPont Company after all of the operating expenses of the cellophane operation—that is, plant costs are considered and they are deducted from sales, and administrative costs of the department are deducted from sales and selling costs are deducted. I believe that is all of them and then we have the operative return. To get their net return, as the document showed earlier this morning, they still deduct other expenses of the parent duPont Company, the overall company, and tax returns, and the ratio there in the one document we had this morning showed from their operative returns there is a deduction of approximately 45% for taxes and 7.7 for the other expenses.

The forecast for the year after this document is for 31%, and immediately following that table appears the extremely in-

9972 teresting statement, "If an operative return of 31% is considered inadequate then an upward revision in prices will be necessary to improve the return."

Now, it follows that three subjects for consideration which are stated to have a direct bearing on the matter of this price increase by duPont in the immediate future are then set forth.

First, the question is raised, is it possible to sell the capacity output of duPont's plants? Inasmuch as cellophane was in extremely short supply in 1948 there does not seem to be any serious question here.

Secondly, the expression was, "What effect, if any, will the price increase have on duPont's case when it is heard before the Federal Judge?" And the indication is that this subject matter will be discussed with the Legal Department.

Thirdly, the third consideration is that the duPont Company may get some undesirable publicity from the press as adding fuel to the inflationary spiral. This question was also left for further discussion.

The document then concludes with a statement as follows:

"If a price increase is in order after the above points have been given proper consideration, we would reduce the converted discount from 7½% to 5% off list, and increase average selling
9973 prices approximately 7½%. These changes would increase the operative return from approximately 30% to approximately 40%."

Then after that statement is appended a table setting forth the proposed amount of the price increases for 13 various grades of cellophane. These increases range from 4.4% to 13.6% over existing prices.

We already have in evidence defendant's exhibits 376 and 377 which establish that within one month after this document was written, the identical price increases recommended in Government exhibit 594 were announced and made operative.

What do the facts revealed by this document stand for? First, there is no question that there have been three recent price increases which have only brought the defendant's operative rate of return to 24.3%, and forecasted return at these prices will only yield a return of 31%.

Second, if an operative return on the investment of 31% is inadequate, then another price increase will be necessary.

Third, no consideration is accorded to competitive stresses which might result from this action. There is no talk in here of Sylvania's reaction and, as usual, the allegedly strong competition from the wrapping papers is ignored.

9974 Fourth, the factors considered are threefold: Whether capacity can be sold in the short market which existed in May 1948; what effect such an increase would have on the Federal Judge sitting in a monopoly case; and whether bad publicity would result to the company.

Fifth, the price increase was effected and our evidence will show that duPont's operative rate of return moved from 19% in 1947, to 25% in 1948, and wound up at 36% in 1949.

Now, if this incident does not constitute evidence strongly probative of the existence and exercise of a power to set arbitrary, non-competitive prices, then I do not believe that evidence of that nature can ever be presented to a court, and we might as well abandon the existence of the power to set such prices as one of the criteria of monopoly.

The story does not end there. In a letter written July 7, 1950, Government exhibit 592, Mr. Donald Carpenter states that—and this is written about two years after the incident we just discussed in the previous exhibit—Mr. Donald Carpenter states that, "After reviewing our situation further, we do not propose to recommend an increase in selling price of cellophane at this time."

The more important reasons for this decision are set forth as follows:

1. Preliminary calculations on number 3 forecast
9975 indicating operative return on investment at present price, in excess of 40%.

2. duPont has been forced to reduce its allocations on cellophane to customers by 19%. There is apprehension that an increase in price at this time would cause serious resentment.

3. An average increase of two cents per pound on cellophane with a simultaneous adjustment in certain converted discounts, result in an increase in operative earnings for the forecast period of approximately $3,000,000 and would bring the operative return on investment to something over 45%.

4. Actual operative return for the first 5 months of the calendar year, 1950, on an annual basis was 45.2%.

Now, nevertheless and despite Mr. Carpenter's decision in this case and regardless of the high rates of return set forth in his reasons, defendant's exhibit 385 establishes that a price increase for cellophane was announced and made effective the following month after this exhibit.

The Government offers in evidence at this time Government exhibit 570 at page 7281 of the bound volumes and it is impounded document number 1.

(Memorandum from Rayon Department to Executive Committee dated January 26, 1948, was received in evidence and marked Government's Exhibit No. 570.)

9976 Government offers in evidence Government exhibit No. 571 at page 7285, and this is impounded document number 22.

(Memorandum from Manager Control Division to B. M. May, Executive Manager of duPont Company dated February 3, 1949, was received in evidence and marked "Government's Exhibit No. 371".)

The Government offers in evidence Government exhibit number [illegible] at page [illegible] and it is impounded document number 9.

(Memorandum from Rayon Department to Executive Committee dated January 26, 1950, was received in evidence and marked "Government's Exhibit No. 372".)

The Government offers in evidence Government exhibit number [illegible] at page [illegible], and it is impounded document number 13.

(Memorandum from Film Department to Executive Committee dated January 26, 1950, was received in evidence and marked "Government's Exhibit No. 373".)

The Government offers in evidence Government exhibit number [illegible] at page [illegible], and it is impounded document number 14.

(Memorandum from Film Department to Executive Committee dated August 24, 1951, was received in evidence and marked "Government's Exhibit No. 374.")

The Government offers in evidence Government exhibit number [illegible] at page [illegible], and it is impounded document number 18.

(Memorandum from Manager Control Division to G. W. Filson, R. S. Rumsdell and F. B. Ridgway of the duPont Company dated August 11, 1947, was received in evidence and marked "Government's Exhibit No. [illegible].")

The Government offers in evidence Government exhibit number [illegible], and this is impounded document number 26.

Mr. [illegible]. We have an objection to that, your Honor. We don't think it is either relevant or material.

Mr. Minner. Do you want to discuss it now, or shall I finish my offer?

The Court. Let us take them up as they arrive.

Mr. [illegible]. These are a series of charts, forecasts of earnings, records and so forth for the Cellophane Division. They lump together a whole host of different products, some of which are in the case and some of which are not in the case. We don't believe it is relevant or material to present such data to this court.

The other documents that have come in give specific information as to cellophane and as to bands. This includes sponges and [illegible] and all kinds of other heterogeneous things.

The Court. How can I ascertain that fact independently of your statement?

Mr. Minner. I submit, the heading at the top of each one of these charts says "Cellophane."

Mr. GESELL. That is the designation under the financial charting system of the company for the division and not for the product. If that is in issue and my statement is not to be accepted, I object on the grounds of authenticity.

Mr. MINICUS. Your Honor will note a little slip that came with this document from the files of the duPont Company. On the first page it says, "Executive Committee charts." It says, "Issued monthly around 11th or 12th. Always two months behind." Below that you find the duPont mark made with the photostating which is "CM-610," and under that we find, "Filed D. F. C.'s desk or C. A. H."

I submit the initials D. F. C. are for Donald F. Carpenter and C. A. H. are the initials for Mr. C. A. Haley.

The COURT. That does not give me any help for what the charts show.

Mr. MINICUS. The charts are descriptive on their face together with the footnotes.

Mr. GESELL. Is it the Government's contention that this is cellophane alone, because it is not, your Honor.

The COURT. In the absence of proof as to what it shows, I am going to accept your statement, Mr. Gesell.

9979 Mr. GESELL. Thank you.

Mr. MINICUS. We are about to put in a companion exhibit with this. There seems to be no question there about it being cellophane and the companion exhibit will show that in almost every case we get an identical result with the results found here, and there is no question that in the one accompanying table it is cellophane.

Mr. GESELL. I have been advised by Mr. Haley and by Mr. Carpenter that this relates to the Cellophane Division and I so state to the court.

The COURT. There is a challenge made to the proffered exhibit. It seems to me, Mr. Minicus, you must assume the burden of removing that challenge.

Mr. MINICUS. May I have a moment to compare the two?

The COURT. Certainly, of course. You may withdraw that until tomorrow if you want to.

Mr. MINICUS. No, sir, I think I can cover it today.

If your Honor will turn to this one point of contact here, impounded document number 16, which is exhibit 575, Mr. Gesell stated that there is no question about these being cellophane figures.

Mr. GESELL. No, I made no statement of any such kind.

9980 Mr. MINICUS. On the bottom line you will find the date 1919 and going across under the column headed "Net Earnings" you will find there the figure for net earnings of $13,564,000,

and looking now at these tables, the top of the page, you will find a notation "1266." At the top of the charts table about three pages back the heading of that page is "Cellophane Sales and Transfers, Operative earnings and net earnings."

Mr. GESELL. The figures are identical, are they not?

Mr. MINICUS. The figures are practically identical for all intents and purposes.

Mr. GESELL. Yes, and if you will look at the top of exhibit 575, to which he has just referred, you will see that that is entitled "Cellophane Division" and presents net earnings for the Cellophane Division. So he has supported by this method my objection.

Mr. MINICUS. I, on the other hand, can point to the only evidence we have. At the top of these charts it says "Cellophane."

Now, let me point to one further point, your Honor. Let us go back to the statement Mr. Gesell has just made with regard to exhibit 575 where he says the top of the chart shows "Rayon Department." It also shows "Cellophane Division."

9981 If you will follow down the two columns of the right hand side, "Average Net Selling Price Pound of Film" and "Average Manufacturing Cost", you will find set out, if your Honor please, certain average net selling prices pound of film, and there we have listed right under there all the way down the prices of cellophane film, not the prices of caps and bands.

That is Government exhibit 16. We start off at the price of $2.51 a pound and we follow until it comes down to forty-two cents a pound, forty cents a pound during the war period and we come down to where it is 48 cents a pound.

Mr. GESELL. The last two columns on that exhibit relates to cellophane film. I am advised that all the other columns are figures for the Division and they check against the Division records. I have been in consultation with the man who prepared the exhibits and he has just shown a tie-back into the others as the Division figures.

The COURT. What particular exhibit have we just been making reference to?

Mr. MINICUS. The exhibit that was objected to, your Honor, is Government exhibit 576 which is impounded document number 26. That is this one [indicating]. Now, we are using as a cross-check against that——

9982 The COURT. That is what I can't find, the paper you are using as a check.

Mr. MINICUS. That is the Government exhibit 575, impounded document number 16. That looks like this (indicating) if your Honor please.

The Court. Mr. Gesell, if your informant is correct why would they take the trouble to make separate the data on the film if this report is concerned with all the products made within the Cellophane Division?

9983 Mr. Gesell. I think this was a statistical study in which they were anxious to find the data that is listed on it, your Honor. I don't know why. This is not a regular report. This is a special study made by a Mr. M. W. Touchton, I am advised. But the figures through net earnings tie into the divisional reports and the last two columns tie into cellophane film.

The Court. Well, for whatever they are worth, I am going to allow the two columns that deal with cellophane film in.

Mr. Gesell. I have made no objection to all of 575, your Honor. What he is doing, if I may clarify this, he took the figures for net earnings for 1949, at the bottom of the column, on Exhibit 575—you see that figure, 13,564—and to prove that I was in error about the other charts showed that that figure tied in precisely to the charts.

The Court. Well, that would seem to prove your version.

Mr. Gesell. That confirms my point, that those are divisional figures and not cellophane poundage figures.

Mr. Mixicus. That was dependent entirely, your Honor, on which were which. However, I might also offer this: We have been through all this once before. Excluding caps and bands,

9984 the reports to the Executive Committe in this industry show that the rest of the business, the cellulose acetate and the sponges, and all the other things were not, first significant enough to appreciably alter these percentages, even if they were excluded; and, in the second place, the reports also make clear that none of the others sold at the high rate of return as cellophane, consequently they would have lowered the rate of return if they are included.

The Court. Well, that is all hypothesis. I mean, if you are going to have a document, you ought to have it clear to the Court what it actually represents.

Mr. Mixicus. Well, of course, we have been under the impression, your Honor, in preparing these documents that when it said "cellophane" at the top of these charts, it meant cellophane. We don't know anything about any secret codes they may have in the du Pont Company where cellophane also means cellulose acetate and sponge yarn. If it said "cellophane", I believe we were justified in accepting these as the figures for cellophane.

Mr. Gesell. It is just like we say Anti-Trust when we refer to the Anti-Trust Division, we refer to cellophane, when we mean cellophane division. It is just that secret a code.

Mr. MINICUS. It doesn't say "Cellophane Division"; it says "cellophane".

9985 The COURT. Well, in the light of the challenge that has been made to the documents, my ruling is at it was stated before; you will be put to the burden of having someone explain what these writings actually represent.

Mr. MINICUS. Now, to what documents does your ruling extend, your Honor?

The COURT. I have not kept notes. Do you know the numbers of them, Mr. Gesell?

Mr. GESELL. The only one I have objected to, your Honor, is 576, but if he is going to contend that 575 is completely cellophane, when it is labeled "cellophane division" then I must make an objection to that, too, because that is inaccurate and it is not the fact.

The COURT. Well, my ruling is directed to the offered exhibits of the Government Numbers 575 and 576.

Mr. MINICUS. Now, how about the prices on 575, your Honor? They are admittedly film.

Mr. GESELL. The last two columns are cellophane films, of 575.

The COURT. That will be admitted for the limited purpose, if you want to utilize the last two columns.

Mr. MINICUS. Now, if I can find the key to this thing, your Honor, do I understand I can go back and explain this further?

The COURT. Yes, you will have full opportunity to

9986 do that, Mr. Minicus.

Mr. MINICUS. Then continuing our offer, the Government offers in evidence Government Exhibit 577 at page 7323 with the heading of the report, "Rayon Department—Outside Sales, 1948".

(The document entitled, "Rayon Department—Outside Sales, 1948" was received in evidence and marked, "Government Exhibit No. 577".)

Mr. MINICUS. The Government offers in evidence Government Exhibit 578, which is impounded document number 20, and that appears at page 7324. This is a letter from Mr. James to Mr. Fahs dated August 20, 1948.

Mr. GESELL. We have an objection to that on two grounds, your Honor. First, it is incomplete; the attachment isn't presented. Second, it purports to present a comparison between the operative return of the Cellophane Division and the Sylvania Company for 1945, and our evidence showed clearly that not only are many products lumped in the Cellophane Division, but that the Sylvania earnings were not representative of their cellophane earnings because of the discrepancy between some of the various products. That was all brought out on Dr. Reichel's testimony.

The COURT. Do you have the attached papers which this document refers to?

Mr. MINICUS. We never received them, your Honor,
9987 to the best of my knowledge. I have no record of them.

This was turned over to us by the du Pont Company as a true report, and it must have been because they impounded it.

The COURT. I am going to allow the document in evidence.

(Letter from Mr. James to Mr. Fahs dated August 20, 1948, was received in evidence and marked "Government Exhibit No. 578".)

Mr. MINICUS. The Government now offers in evidence Government Exhibit 579, appearing at page 7325, and this is an impounded document, number 15.

Mr. GESELL. We have an objection to this, your Honor. It doesn't appear who prepared it: it doesn't appear for what purpose; it doesn't appear from what data. In addition, it represents a comparison between the Sylvania Company and the Cellophane Division and such comparisons, we submit, are immaterial and meaningless in the context of this case. Sylvania makes a number of different products, as does the Cellophane Division, and a comparison based upon whatever data it was that they used is of no value. There is no showing that any use was made of this. We don't know who prepared it. It is a piece of paper found in the files.

Mr. MINICUS. It is so valueless, in fact, your Honor, that they took the trouble to impound it.

9988 Mr. GESELL. You misunderstand. The cellophane figures which you have in all your other data are accurate figures of the Cellophane Division's earnings, and those are a confidential business matter, and that has nothing to do with the validity of the comparison or the accuracy of the Sylvania figures.

The COURT. Nevertheless it came from the defendant's files. It could not have found its way there by itself.

Mr. GESELL. Is it clear, your Honor, that it has any value?

The COURT. Its probative value is a matter that you can argue to the Court; but insofar as it came from your files, and it is so closely related to the issues in this case, I can not see any rational basis upon which it should be excluded. Therefore the objection is overruled. It is admitted.

Mr. GESELL. As an admission by the Company, your Honor?

The COURT. I said its probative value you can argue. But here is a paper which is a comparison of figures with your competitor, and I think it is relevant for the Court's inquiry. Now, if you think it is defective in any respect, you can bring that out in surrebuttal.

(The document entitled "Comparison of Data for
9989 Sylvania and Cellophane Division, years 1936 through 1945" was received in evidence and marked, "Government Exhibit No. 579".)

The Court. I am going to leave at quarter to four. I have a dinner engagement out of town. You can gauge your time accordingly.

Mr. Minicus. I hesitate to go into all of this earnings material in the condition of the evidence at this time, and it would mean passing on to another major subject if I skip that. May I suggest it might be better for me to survey this material tonight and see if I can find the key to this thing and come in and give it in the morning. If Mr. Gesell desires to rebut everything up to that point, the time is available for him now.

The Court. Do you want to start on your comments?

Mr. Gesell. No, your Honor. He hasn't finished anything or gotten anywhere. I want to wait.

Mr. Minicus. Well, I disagree with that. I have finished two major subject matters today already, your Honor. I have finished the defendant's position in the industry and I have finished our price research. We are turning now to earnings. There is some question about the evidence. I have finished, as far as that is concerned. I am perfectly willing to start another major subject now, and we will pass on from all this other rebuttal.

9990 The Court. Well, when are you coming back to finish the unfinished chapter as to earnings?

Mr. Minicus. Tomorrow morning.

The Court. Well, pass on to your other major subject.

Mr. Minicus. Would you prefer it at this time?

The Court. Yes, take another half hour.

Mr. Minicus. Well, are we to have an answer to the material I have already covered? This next material has nothing to do with what I have previously gone into, your Honor.

The Court. Do you intend to make answer to what has been gone into today?

Mr. Gesell. Yes, and if you want me to do it now and use the time, I will. It is a very truncated procedure. If I could have two or three minutes to get my papers together—I will take only about five or ten minutes to answer.

The Court. I am going to take a five-minute recess and stop at quarter to four, so gauge yourself for fifteen minutes.

Mr. Gesell. Your Honor, before we do recess, we are making such extremely slow process, would it be possible on the Court's calendar to meet Monday as well as Tuesday of next week?

The Court. I don't know what my calendar is.

Mr. Gesell. At the defendant's table we are most
9991 anxious to close this case next week, partly because of my involvement the following week in the I. C. I. case.

Mr. Minicus. Your Honor has my assurance we will finish next week without Monday being necessary.

Mr. GESELL. I don't see how he can give that assurance when he keeps setting this thing up for sur-rebuttal with statistical inaccuracies and incompetent material. We are going to have some problems, your Honor, and I hope we can have as much time of the Court as possible.

Mr. MINICK. The only reason why Monday would be inconvenient, I have made an appointment to be in Washington on Monday morning.

The COURT. I have to see what my calendar shows for Monday. I don't know whether I am engaged.

(At this point a five-minute recess was taken.)

9992 Mr. GESELL. I have very few comments, if your Honor please, on these documents. In the main, they relate to the principal issue that is raised by them, namely, the defendant's position.

It seems to me that we have come all the way around Robin Hood's Barn. We are back talking about 75% strawberry ice cream and Wilbur Buds.

Now, that was the case the day they opened and after this whole mass of economic and factual market-data, they are back to strawberry ice cream and 75%.

I don't want to take the time now, because we will do that in our final arguments, to argue all the facts, but since the Anti-Trust Division sought to draw a statement clearly defining their position on this market, we think it might be well briefly to have one of ours related to it.

As I see the issue, the Government says that you must draw the line at cellophane in determining the market—all types of cellophane is their selection. They say that if you don't drawn the line there for the market, you have to go down one notch and draw it at transparency, low cost and protection, and presumably put in the other transparent films that have protection and transparency. They admit that there are other markets, broader markets, but they say you must drawn the line and their preference is the one they selected in their offices in Washington before they went

9993 out and found out anything about the business. That is, cellophane, and now, as a line of retreat, they say transparency, low cost, and protection.

In opposition to that, our point of view is that you have to draw the line—we are in agreement there,—but we say that line has to be drawn by your Honor on the basis of all the market facts, the facts of the market place where cellophane is sold, not the facts of the market place where green tile is sold, or aluminum ingots are sold, or something else is sold—but where cellophane is sold.

The COURT. You say, according to your view, the market was represented by the day you put all those edibles on the bench?

Mr. GESELL. Yes, there was the market and there was a man who was a competitor.

Now, when your Honor looks at where he shall draw the line, he has to consider all of the evidence related to this matter, not only what some technician may have said in a Buffalo laboratory about the relative properties of two films—that is important—or of two materials, but also of what the people grubbing around in the business of buying and selling say about what the economic and business facts are.

Now, we cannot attempt, your Honor, here to cover all those facts, but I simply want to mention briefly two aspects of it,
9994 which I think point up the difference between us and the Anti-Trust Division.

We were compared today, for example, with Gas and Oil, and it was said both of those supply furnaces, and it was said that we were claiming that they were in the same market and that that was absurd. We are not making any contention about gas and oil, because we are trying a cellophane case, but it seems to me from our own common experience, that there are some substantial differences. If you buy a gas furnace, or you buy an oil furnace, you buy it for a long period of years, presumably ten or fifteen, just as you do when you put on a slate roof, and possibly the economic and market facts about your choice would determine a distinction between those two products when you saw all the facts.

Here we have emphasized in our case a consumable product, and they offer evidence today to that effect, that it was a usable, consumable product, and we have shown the constant turnover and the short period and the constant changing—it is as though the fellow with the green slate roof was changing his roof every few months, which he doesn't do, but that is what our cellophane users do, on the evidence.

Now, let us take the market from another point of view. He says the market is those customers—he said not himself,
9995 though that is what he really means—he says those customers who want the transparency, low cost and protection of cellophane, that they are the market. Well, your Honor, there is such a group of customers who want duPont cellophane, and won't buy Sylvania cellophane. Are those separate markets? There is a group of customers who want moisture proof and another group who want plain, and they won't take the other. Are those separate markets?

In talking about transparency, there is a group of customers who want color film and won't buy transparent film. What he is saying to your Honor is that you can have a monopoly of Buick cars, but you can't monopolize the Chevrolet. The special customer interest of the particular product, what that customer wants.

he says determines the market at any given time. I label that as being nonsense from an economic point of view, but of course it is also nonsense from a legal point of view. He will not and cannot look at the facts.

They stated to your Honor in this Court that they would prove on their evidence that there was no competition between these materials, and cellophane, and I intend to show the Court by a whole host of documents, introduced this morning, that makes that competition explicit'y.

They don't say anything about the fact that these are functionally interchangeable products. They don't get down and
9996 come to grips with the buyers and the sellers, and the competitors. They talk about a chemical test—this is the only cellulosic product—and I will bet you my hat that many a housewife who chooses from one to the other doesn't know whether it is a cellulose product or not. They have to get down and look at the market.

Then, if your Honor pleases, that is only the first step, and here is where on his Wilbur Bud theory he ignores completely the other step, but it is the step he put up to your Honor on his opening, and it is the step that is explicit in the complaint, and that is the step of power.

Take the market where Cellophane is sold—and your Honor will have to determine whether du Pont can raise or lower the price at will, without competitive influences—whether it can dilute quality without regard for competitive influences, whether it can make as much or as little as it chooses and not worry about substitutes, and when we get down to those essential ingredients of the case, which are the ones that are spelled out explicitly in the opening, and explicitly in the complaint, we will find that he has not brought forward his power proof, whatever he says the percentage is, and in these documents I intend to show your Honor substantial evidence of the very absence of the powers that he keeps asserting exist.

Let's take 589 first. That is one of the Exhibits that he of-
9957 fered. Here is an exhibit which he offers on his own case. Here is an exhibit that he himself submits. It is written by a man that he had full opportunity to cross examine. He says, "Other materials against which cellophane competes are foil and, in the field of transparent films, well established competitors are pliofilm, Seran, Cry-O-wrap, Buna N, and in addition to these there are a number of films made from polystyrene, polyvinyl alcohol and other materials which are coming into the field."

Earlier in the Exhibit he talks about the competition with wax paper, glassine, greaseproof and vegetable parchment.

Then, your Honor, he doesn't just say that that competition exists, but in this document sponsored by the Government, in proof of their market theory, look, what he says over on page 3 about research. He presents a picture of the kind of give and take in the market, the constant shift back and forth between these materials on a competitive basis, with improvement in quality and benefit to the consumer and all of the very things that we have been saying are the facts. And here comes the Anti-Trust Division and says on this document "This is our Market proof."

Now, your Honor is entitled, since they offer this document, to put substantial weight on it, and it spells out in explicit, clear terms, the existence of this competition, the quality of it, the character of it, and many aspects about it.

9998 Just to take another one, take 588, which is one of the impounded documents. This relates to bands, and you have read the table on the first page, but if you will look through that document when your Honor has the opportunity, you will see a detailed discussion of the intense competition that is taking place with lead and aluminum foil, with the aluminum closures in this market, the difficulty duPont is having developing a machine that will apply its bands, and its hopes because of its research which resulted in the development of this machine, to get a bigger opportunity for its bands against these other competitors.

Again, that is what we have been telling your Honor throughout our case, and in this highly selected segment, they can't help from having it pop up again and again, because it is an essential part of this business, and no theory or no convoluted reading of selected sentences can avoid it when you look at the true meaning of the documents as a whole.

Take 587, this great big report, your Honor, written by D. H. Edwards, Survey of Cellophane, Future Capacity, Economics and Competition. Mr. Edwards is a fellow up in Buffalo in the Engineering Research Laboratory, and in his enthusiasm at the beginning of his report he says some glowing things about cellophane,

9999 and he refers to a cellophane market, and the Government likes that language from this fellow that has no relation to the sales or the realities of the market place, and the language isn't bad, but let's take a look, your Honor, over at the portions of this that were not read to the Court.

You have been told again and again that this du Pont Company is a great big fat monopoly that sits stagnantly on a heap and doesn't have to do anything, and then here they come along with a detailed 70-page report which shows concern about competition, analysis of competition, and a full discussion of the various steps that should be taken to meet that competition. And those steps, your Honor, in this document, this survey, are not steps that talk

about restraint, they are not steps that talk about improper practices; they are steps that say: Let's get our research into our plants as fast as we can. On page 17, let's get double sheet casting machines going. Let's get continuous xanthation going. Let's get dispersion coating going. Let's get continuous steeping and shredding machines in operation. Let's get the viscose ripening room on a continuous basis. And down through this report you see discussion plant by plant, machine by machine, based on detailed research studies of things that can be done to lower cost, improve efficiency and increase volume.

Now, these cost money, your Honor. The report shows they cost substantial money.

10000 Now, if we were a big, stagnant, fat monopoly, not confronted with any kind of competition, would documents like this be written? I suggest that they would not be and that these are indicative of the continuing dynamics of this company, and of its industrial genius and not indicative of monopoly. The fact that because we do these things and do them well we are successful certainly isn't cause for bringing us to the bar of this Court or any other Court.

Now we have the price question, and I confess to continue to be confused about the price problem. They present 591 to your Honor and say that if this doesn't show arbitrary non-competitive prices, they don't exist in this case and they will never exist in any monopoly case that is ever tried, and you read 591 and it is a reasoned business analysis of the problems incident to whether or not the price should be raised, and they say that there is no reference to whether or not we can sell the product, but at the bottom of page 2 there is a whole paragraph that shows that there was a survey made of the various plant managers and questions sought, information obtained, as to whether or not they could sell the output at the other price, and then they say, but it paid no attention to what business Sylvania would get because of this increase, and yet they know from the exhibits that at this time Sylvania's price was higher than ours, not the same, as they stated.

10001 Then they say this price went into effect precisely as written. I don't know whether it makes any difference, but it didn't. If your Honor will look at 577 he will see that in some respects it did and in some respects it did not. But that is not the point. The point is here that it was a business document considering carefully what should be done about prices.

Your Honor said you wanted to adjourn at quarter to 4. We are beyond that time

One other thing, your Honor. The record should show that 577 and 591 were impounded as a result of the conference in chambers,

although they are not given impounded document numbers by agreement with Counsel.

The COURT. Adjourn court until tomorrow morning at 10 o'clock.

(At this point the trial was adjourned to Thursday, May 22, 1952, at 10:00 o'clock a. m.)

10002 THURSDAY, May 22, 1952, 10 O'CLOCK A. M., E. D. S. T.

Present: As before noted.

Mr. GESELL. Yesterday, your Honor, I made some general comments about some of these befuddled exhibits. I have one further general comment and then I wish to deal briefly with a few specific points in particular exhibits.

My general comment is in the nature of a caution. It is very important in these exhibits that are coming in, we believe, for the Court to watch closely the dates of some of the documents. A document written by a technical man in 1947 coming out of the war period analyzing the properties of pliofilm which had hardly been made at all during the war cannot, for example, be used to contradict the testimony of market people as to the competition which pliofilm offers in 1951 and 1952.

What I thought I could best do to illustrate my point would be to turn to Exhibit 589 to point up the significance of dates. That is a document written by Mr. Smith. It appears at page 7530, your Honor, of the Government's print.

Now, great attention was directed to the paragraph that says "Cut-price competition," in which Mr. Smith says there is

10003 no cut price competition in the business. Now, let us look at the date. It is June 1951. Your Honor will recall that the O. P. S. freeze order on prices went into effect January 26, 1951. Your Honor will also recall that we have evidence in the record that from the period of 1947 up to 1951 there was divergence of prices as between du Pont and Sylvania, and finally, your Honor, if I may direct attention——

Mr. MINICUS. If Mr. Gesell will insist upon my reading qualifying sentences that follow, I must do the same. The next sentence in this things, says, in normal times, there is no price differential. This is not directed to that period. It is covering all the periods.

The COURT. Just a minute. Will you let me get the first part of your sentence? Will you read that?

(The sentence referred to was read by the reporter.)

The COURT. Will you continue and finish your sentence?

Mr. GESELL. To certain exhibits indicate bearing on this subject you will see the emphasis I am putting from the point of view of time. Government Exhibits 436, 437, 438, 439, 442, 441, 443, 78,

79, and 80, show cut-price competition between du Pont and Sylvania starting in 1931 and going up until 1941; and Defendant's Exhibits 571 to 590, a group of twenty additional exhibits, show such cut price competition in the period 1931 to 1940.

10004 So, I say from the point of view of dates, when this is cited to your Honor on the closing arguments and in brief as proof that there is no cut-price competition in this industry we must look at it in terms of the conditions that existed at the time it was written and we must look at the other evidence in the case.

Secondly, bearing on the quality of these films, may I direct attention to page 2 of this same exhibit. This is written in 1951. Under the heading, "What we do to create competition," Mr. Smith gives some examples and one of them is in the fresh meat field, and he says: "A good example of this is the wrapping of fresh meats, where after many years of development, a film was produced which would retain the natural color of meat for the necessary period of sales life. As a result of this, one of our major competitors in this field has redoubled their efforts to produce a satisfactory film and has done so, thus establishing a type of competition that heretofore had not existed."

Now, this is in 1951. It reflects the kind of competition which the pliofilm people talked about on the deposition and which many of our witnesses talked about, and it cannot be refuted by taking a 1947 technical survey by some man who says that in 1947 pliofilm wasn't any good for meat, when we know they came out later with a new type of pliofilm that cut deeply into our business.

10005 Now, so much for the general comments.

Now, as to certain specific comments. Your Honor will recall that yesterday certain statistics were put in evidence, exhibits 531-A, 537-A, and 541-A, which appear at pages 7326, 27 and 28, respectively, and your Honor asked if we had any comment about them, and one of the comments I made was that they didn't include imports, and Mr. Minicus took me on about that at page 6975 of the transcript, and he said, "Less than one-tenth of one per cent was imports." Here again I have a word of caution. At another occasion in the record Mr. Minicus, at page 4822, discussing the years 1924 to 1929 shown on these schedules, said, "We maintain strenuously that up to 1929 very significant importations of European cellophane were being sold in the U. S. by importers." And when we had these exhibits up, I took Mr. Cook on about it at page 1930 of the print, 2219 of the transcript, and I asked him why he had left the imports out, and as a result of the colloquy and examination that took place, he said he doesn't have the records in front of him but he thinks it might be as much as twenty per cent of the total.

All I say is again these facts and figures have to be looked at not in the light of the representations of counsel to meet the particular moment, but what the evidence shows.

10006 Now, let us take up another question. This arose on many of the exhibits, particularly this time their Exhibit 586, the question of short supply. And all yesterday and other times in the case we have constantly heard about this egregious short supply of cellophane that has existed from sometime about the time the war started, and the suggestion has been made that that is indicative of monopoly, that it is self-created, that it is unusual, and that it is to be criticized.

Your Honor, what I would simply like to say with as much emphasis as I can is that this condition prevailed as to all flexible packaging materials, not just cellophane. We have not yet handed up to your Honor your copies of the print of the summaries of the depositions, which are Defendant's Exhibits 1006 to 1021 and I would like to hand up two copies now. They contain a great deal of evidence showing that all these other materials were in short supply. It wasn't just cellophane. And the fact that cellophane was in short supply is not indicative of a monopoly, if the facts are looked at as a whole and fairly. We know there was a pent up demand as a result of war conditions. The evidence shows shortages of raw materials and it shows rapidly growing markets. What does this evidence show? At page 246 of that print you will see testimony on waxpaper shortages, starting at the

10007 top of the page. And if your Honor will recall, Mr. Leinback, the gentleman who produced the results of his shopping experience here testified at page 6777 of the ditto and 5766 of the print about the shortages in greaseproof, glassine and waxpaper along the same lines as the deposition to which I have referred your Honor. At page 326 of this print there is more about shortages of glassine and greaseproof. And at page 144 there is testimony about shortages of pliofilm. And to carefully go through these exhibits and constantly harp on shortages as to cellophane without looking at this market is as unrealistic as their Wilbur Bud theory.

They put one exhibit in that showed it, GX 581, which says—and they didn't read this yesterday, your Honor; it is the September, 1950, monthly report of the film department—"Cellophane users are finding it more and more difficult to obtain competitive packaging materials, such as glassine, waxpaper, foil, cartons, etc. Producers are reported to be limiting sales." So that this condition of shortage that we have heard so much about against the evidence as a whole was a condition generally prevalent in these flexible packaging markets and cannot be used as indicative of a monopoly purpose, intent or result.

Now, one further specific point on these exhibits. Two exhibits were introduced as to prices yesterday. One
10008 of them is GX 592. There is a report or letter by Mr. Carpenter to Mr. Warren Kinsman, dated July 7, 1950, in which he reports that they have been considering a price increase, and the memorandum indicates that it was deferred for the time being.

It also states in the next to the last paragraph at the ' om, "Actual operative return for the first five months of the calendar year on an annual basis was 45.2 per cent."

Then it was represented to your Honor that in spite of Mr. Carpenter's decision, and regardless of the high rates of return, quoting counsel at page 7064, that an exhibit in evidence shows that a price increase for cellophane was announced and made effective the following month. And it was represented thus to your Honor that here was an example of an over-reaching monopoly, seeking higher and higher returns even when it had a 45.2 per cent return.

Well, there are two facts—I am talking facts, your Honor—that are pertinent here. In the first place, they have introduced another exhibit that shows that even after the price increase, the actual operative return, exhibit 574, was 35 per cent, even after the increase, and if we stop again to think about the dates, we will understand why. Korea took place June 27, 1951, and the in-
creases that went into effect were twice as much as Mr.
10009 Carpenter was talking about in this memorandum, as the inflation spiral started, not as great as Sylvania put in, and yet the return dropped rather than increased, as was suggested by counsel yesterday.

Now, let's take up the other exhibit. That one is 591. Does your Honor have that exhibit before him? It appears at page 7538 of the print. It is dated May 27, 1948.

It was stated with respect to this exhibit as follows by counsel yesterday: "Now, if this instance does not constitute evidence strongly probative of the existence and exercise of a power to set arbitrarily non-competitive prices, then I do not believe that evidence of that nature can ever be presented to a court and we might as well abandon the existence of the power to set such prices as one of the criteria of monopoly."

Well, let's analyze what the record shows with respect to this price change. There were two points made about it, one that here was du Pont purposely planning to increase and increase its rate of return. This discusses that the increase would raise the operative return from thirty to forty per cent, and yet GX 577 shows that in fact after the increase the return was only 27.2 per cent.

But second, and far more important from the point of
10010 view of this case, is the comment and the emphasis that was
given repeatedly yesterday by counsel to the fact that no consideration was accorded to competitive stresses which might result from this action. And that was the idea of arbitrariness. I quote, "No consideration is accorded to competitive stresses that might result from the action."

Well, now, your Honor, we have in evidence exhibits which were not referred to but which are directly pertinent, DX 375 to 379, and I would like to have those handed up to your Honor. They are in Volume 3 of Defendants exhibits and appear at page 704.

This is the same price increase discussed in the document yesterday as to which counsel represented that no consideration was given to competitive stresses. Let us look at these bulletins that went out to the salesmen. That is where competitive stresses are felt, in the market.

First of all, we call attention to the fact that there were substantial increases throughout the whole economy, wholesale prices, raw material prices, materials used in the manufacture of cellophane, and so forth. Then if you look at the bottom, it says, "The price advances on cellophane are of course still substantially less than those of its principal competitive products, waxpaper, glassine and boxboard. We are attaching revisions of Bulletin
5 . . ." and so forth. "It is important to remember there-
10011 fore, that the cost differential between cellophane and wrapping papers is still considerably smaller than pre-war." In other words, talk about competitive stresses, we are forced by these economic facts to raise our price, but we keep pointing out in the market place that we are closing the gap.

Then if you will turn over, your Honor, you will see just exactly what was involved. We bring it down to cases. We bring it down to unit cost of wrapping loaves of bread. And we give to the salesman concrete data which they can use in the market place for the purpose of showing that this gap has narrowed and that we are in a position to compete and to compete more effectively, and yet counsel says no consideration is accorded to competitive results.

If your Honor will look at page 708 of Exhibit 378, which is one of the attachments to this bulletin and which relates to this same price increase, you will see what was happening in the market place. Price increases are shown for sulphite, waxpaper, bread wraps, bleached glassine, glassine candy bar wraps, and boxboard. Then on the next page we compute on the new price basis the difference between wrapping a loaf of bread in cellophane and in waxpaper on the basis of the new prices.

Now, your Honor, it is simply incredible to me that counsel for the Anti-trust Division should take the pos...on that
10012 that is an arbitrary pricing policy by du Pont when their documents show, when you look at all of them and not just some of them, that the price increase was dictated by rising costs and economic facts in the market, was reasoned through in an intelligent way, resulted in a reasonable operative return and narrowed the gap and made the company more competitive against its principal competitors.

Mr. MINICUS. I regret, your Honor, that we don't have the documents and reports that the du Pont Company will issue tomorrow or next month. All we have is what our discovery has brought to light, the date of it. The date of the document read was 1951. That was the year the discovery was made. We couldn't go beyond it and have tomorrow's documents. It seems as though, as the case goes on from day to-day, one is expected to be three weeks ahead of it. If it goes along long enough they may be able to do something to correct this situation. Perhaps that is something we can look into this morning.

With regard to these documents we have put in, however, you will note that they are discussions of policy-making level and not bulletins for general dissemination.

As we were saying yesterday, if your Honor please, the extent of du Pont's participation in the domestic markets for cellophane and for caps and bands both as a manufacturer and as a
10013 seller has been influenced to a small degree by the interjection of Olin into this field.

Existing evidence is indicative of a present capacity for that producer of approximately 33 million pounds. This is out of an industry-wide capacity in excess of 320 million pounds and represents consequently approximately ten per cent. In terms of supply and relative market position the impact of this added capacity upon the participation of existing producers is lessened by the fact that since institution of this action du Pont has expanded its own capacity approximately 80 million pounds, so that Sylvania, who has increased 27 million pounds, has not even been able to maintain its former position.

Nevertheless, small though it may be, a third supplier has entered the cellophane market. Evidence of that fact is in the record of this trial on behalf of the defendant and, from such evidence, I believe an inference is sought that du Pont's position has been so diminished as to remove it from any possibility of being adjudged a monopolist. There are, however, certain factors relative to the entry of Olin, which the Government believes the Court should consider in this regard.

The complaint in this action was served and filed on December 13, 1947.

Mr. GESELL. May I interrupt, your Honor? I had un-
10014 derstood we were going to discuss the earning exhibits that were introduced yesterday. It is apparent we are not. Therefore, I have additional comments which I will want to make on those exhibits.

Yesterday, when we broke up, I understood Mr. Minicus was going to try to get himself straightened out overnight and come back and discuss those. I didn't deal with those and if we are going to pass those I think I should deal with one point of substance that I have with respect to them. Are you going to discuss those?

Mr. MINICUS. We are still working on them. We don't know. If we find the key to the du Pont statistics we may, but if we don't we will not.

The COURT. You will reserve the right to yourself to comment when and if Mr. Minicus brings it forth.

Mr. GESELL. And by the time he closes, if he has not gotten to them, I will bring up that one point.

The COURT. If you prefer him to do it now, he may.

Mr. MINICUS. I am willing to let Mr. Gesell do it now. I don't know whether we are going to find the answer to this.

The COURT. I suggest you withhold your comment.

Mr. GESELL. Very well, then.

Mr. MINICUS. I stated that the complaint was filed and served in this action on December 13, 1947. No evidence has been
10015 offered to the Court probative of the desire on the part of the defendant to license a third party under its processes prior to the date of the filing of the complaint. In fact, we maintain the proof is entirely to the contrary.

Documentary evidence to be introduced at this rebuttal will establish that the first action on the part of du Pont to peddle its know-how was taken four months after this suit was commenced. The Olin agreement was executed two years later.

The COURT. Is there any evidence that anyone asked for a license and was refused one?

Mr. MINICUS. Prior to that date, sir?

Mr. GESELL. There is none, your Honor.

Mr. MINICUS. That would depend to a large degree on how your Honor reads the evidence. There were disputes about the rights that should be granted under certain of the interference proceedings. There was the application by Marathon to extend its rights to moistureproof cellophane with that opaque coating to other fields than the cheese field. They wanted to extend into

ments. There is in evidence certain aspects of people trying to extend their rights.

We have no evidence of anybody approaching du Pont for a full scale license to manufacture. Nor do we have du Pont, on the other hand, taking the affirmative action that they took here
10016 and actually going out and looking for somebody to come into the field. Something happened in December 1947 that made them go out soliciting buyers of their products.

We further intend to disclose that the primary motivation for this action was to confuse the issues of the present litigation. This may eventually call for the resolution of a basic question of law—that is, whether a putative monopolist of twenty-five years standing can purge itself of liability by action taken after it has been apprehended. On the other hand, that problem—

The COURT. After it has been what?

Mr. MINICUS. Apprehended.

Mr. GESELL. That is the issue your Honor is trying, whether we have been apprehended.

Mr. MINICUS. I was using that word in a loose sense. I don't know whether it is incorrect. I don't believe it is. The charge is made in 1947. When a criminal is apprehended it does not mean he is convicted. He is brought into court to find out what he did about it. I think I can stand on that word.

The COURT. I won't quarrel with you.

Mr. MINICUS. The reason I say that, the reasons are several: Firstly, this new supplier is, in its creation, entirely a product of the acts and will of the defendant. Secondly, its relatively
10017 insignificant capacity renders it virtually impotent as a market factor in the presence of the undiminished and ever-expanding dominance of the defendant. Thirdly, we are about to demonstrate that past cooperative relations between Olin and the du Pont Company offer scant promise that in the field of cellophane a new supplier has been introduced which will provide the aggressive competition necessary to correct the evils attendant upon a controlled market, which we maintain have pervaded this industry for so many years.

Offers in evidence

The Government offers in evidence Government Exhibit Number 593 appearing at page 7543. This is a letter from Mr. G. G. Holman of the du Pont Company to Mr. T. L. Hines and is dated March 10, 1950.

(Letter dated March 10, 1950 from G. G. Holman to T. L. Hines was received in evidence and marked "Government Exhibit No. 593.")

The Government offers in evidence Government Exhibit 594 appearing at page 7545 of the bound volumes. This is a memorandum for files written by Mr. J. L. Fahs on December 14, 1949, under the heading, "Summary of Cellophane Process Sale Negotiations."

Memorandum written by J. L. Fahs, dated December 14, 1949 was received in evidence and marked "Government Exhibit No. 594.")

10018 The Government offers in evidence Government Exhibit 595 at page 7555. This is a memorandum report by the Development Department to Members of the Executive Committee dated May 27, 1949.

(Memorandum to Members of Executive Committee from Development Department dated May 27, 1949 was received in evidence and marked "Government Exhibit No. 595.")

The COURT. Off the record.

(A discussion was had off the record.)

Mr. MINICUS. The Government offers in evidence Government Exhibit 596 at page 7564. This is a memorandum from J. L. Fahs to Mr. E. K. Gladding.

(Memorandum to E. K. Gladding from J. L. Fahs dated June 4, 1948 was received in evidence and marked "Government Exhibit No. 596.")

The Government offers in evidence Government Exhibit No. 597 at page 7566. This is a letter from Mr. H. E. Ford to Mr. E. K. Gladding.

(Letter from H. E. Ford to E. K. Gladding, dated January 31, 1949, was received in evidence and marked "Government Exhibit No. 597.")

The Government offers in evidence a document formerly marked for identification as Government Exhibit 566 for identification, and now offers it in evidence as Government Exhibit 568.

(Government Exhibit No. 568 having previously been
10019 marked for identification was received in evidence as "Government Exhibit 568.")

The Government offers in evidence an exhibit formerly marked for identification as Government Exhibit 566 for identification and now offers it as Government Exhibit 566.

(Government Exhibit No. 566 having previously been marked for identification was received in evidence as "Government Exhibit 566.")

The Government offers in evidence Government Exhibit 598 at page 7585. This is a memorandum from Mr. H. E. Ford to Mr. Gladding.

(Memorandum from H. E. Ford to E. K. Gladding, dated April 26, 1949 was received in evidence and marked "Government Exhibit No. 598.")

The Government offers in evidence Government Exhibit 584 at page 7419. This is impounded document No. 51.

Mr. GESELL. May I see that memorandum?

(Memorandum to Dr. G. M. Karns, dated February 16, 1949, was received in evidence and marked "Government Exhibit No. 584.")

10020 To consider that any policy or any major action was pursued or undertaken by defendant since 1947 without the effects of that policy or act being measured in terms of its meaning and effect upon the instant litigation is to defy reality. Every contract was executed, every report constructed and every letter written, against the background of this monopoly issue.

An illustration of this fact is found in Government Exhibit 593. This is a letter written by Mr. G. G. Holman to Mr. T. L. Hines on March 10, 1950. Mr. Holman was a du Pont representative and acting as liaison in the Olin exchange of information.

The communication here is headed "Cellophane Anti-Trust Suit." The first paragraph discusses certain reports which the du Pont Company was then preparing to illustrate the extent of the material turned over to Olin. The body of the letter then goes on to descibe certain letters and communications which are to be written by named du Pont representatives to Mr. Kunsman, and it is clear from the language of this letter that these communications are to be written some time five months in the future from the date of this letter. These letters would detail the nature of the assistance offered to Olin, and then toward the end of the document the following statement is made:

10021 "Such an approach will give a fairly comprehensive picture of what is being done. It should form the basis for analyzing the probable value of this evidence as related to the other factors of our defense. * * *

"If this approach to this problem meets with your approval, we will advise all parties concerned to collect the information necessary and to prepare the statements to Mr. Kunsman on any date specified. I will receive them from him and place them in your hands at that time."

Here, then, is an actual instance of consideration being accorded statements to be prepared at a future date, not for the purpose of causing an increase in the supply of cellophane, nor to inform Olin of the processes involved, but admittedly for possible use as evidence in this trial.

Mr. GESELL. Your Honor, I must rise on that. That is a gross misrepresentation of this exhibit. I asked Mr. Hines to pull together informat on as to what was going on under this contract so that I would have documents in my possession not to be introduced in evidence, but assembled facts which I as an attorney could

consider using in this case; and to suggest that this was an effort to manufacture evidence is most improper and not supported at all by the document. Mr. Hines was our representative in the film department who acted as liaison for requests for information from counsel.

10022 The COURT. What exhibit number is that?

Mr. GESELL. That is 593, your Honor, at page 7543. It is captioned in this case, and he is carrying out our request to assemble information, not to manufacture documents for evidence.

If this is to be an issue in this case, your Honor, I suggest that where such a charge is made, which is tantamount to a charge of fraud on the part of counsel and the defendant in this trial, that we are entitled to have the individuals brought forward here on that document, and he is not entitled to put it in evidence with such gross misrepresentation, a document that does not support his contentions whatsoever, and I wish to object to the introduction of the document if it is to be given that purport and that meaning.

The COURT. What is the purpose of the offer?

Mr. MINICUS. Your Honor, we have no private wire to Mr. Hines. We can only go by what a document says. If your Honor will turn to the second page of this document, the first paragraph at the top of that page, the second sentence to us clearly says, "It should form the basis for analyzing the probable value of this evidence as related to the other factors of our defense." Now, that is all I offer the document for. Whatever that language means in its commonly accepted sense is what I offer the document for, sir.

10023 Mr. GESELL. Well, he has given it a gloss, your Honor, in his prior comments. I say that is irrelevant and immaterial to the issues of this suit. I move to strike the exhibit on the ground that its relevancy and materiality has not been shown.

Mr. MINICUS. Let us look at my prior comments, sir. My prior comments were entirely to the effect that every contract was executed, every report constructed, and every letter written against the background of this monopoly issue. I simply say then that this document shows that all of these policy matters were weighed against the background of this case; that everything they did at that time after 1947 had the issues and the effect upon this case in mind.

Mr. GESELL. That is not what counsel stated, your Honor. If the reporter will read what counsel stated, it was that these were exhibits prepared for the purpose of presenting this information to the Court.

The COURT. There is no evidence of that before me, so I am going to ignore any such statement if it was made.

Mr. MINICUS. I deny that the statement was made.

Mr. GESELL. I move to strike this as irrelevant and immaterial, your Honor, to the issues of this suit.

Mr. MINICUS. Maybe when Mr. Gesell read that document last night he thought that is what I was going to say about it, but that definitely is not what I said about it.

10024 The COURT. If there is an objection to the admission of GX 593 it is overruled.

Proceed, gentlemen.

Mr. MINICUS. There is one difficulty that arises, your Honor. Yesterday at a bench conference I assured the Court that I thought I could finish on Tuesday. In fact, my original schedule called for finishing Friday. Now, I can finish on Tuesday, but I can under one circumstance. Of course, Mr. Gesell has the right to object, and I am not preaching here against his objecting, but there is a period provided when I am through for Mr. Gesell to answer. Now, if he can restrain himself sufficiently to answer me at that time,—and I assure you I will try to do the same thing—we can get through with this thing; but if Mr. Gesell is to pick us up and argue out every particular document as it is introduced I can't promise we will be through before July 4th. The only thing I would like to make clear if that continues, your Honor, is I cannot be responsible for not finishing on Tuesday. I can finish on Tuesday if we follow the procedures we originally stated we would follow. If I am allowed to discuss my documents and Mr. Gesell will then come in with his answer to the discussion, I can assure the Court I will finish at that time. Of course, I am not addressing myself to the objections, and I am sure Mr. Gesell must make his objections in a timely fashion.

10025 The COURT. All right; make your best efforts and proceed.

Mr. MINICUS. Now, a perusal of the remainder of the documents that I have introduced this morning permits of no doubt that the project to license a third producer was embarked upon as a direct result of the institution of this lawsuit and was further pursued for the purpose of any beneficial effects which might be exerted upon the outcome.

10026 Government Exhibit 594, written in December, 1949, is a summary of the cellophane process sales negotiations. The first four pages of this document describe various contacts made by the du Pont Company in order to interest others in purchasing its process. Some of these people were approached initially by the du Pont Company. Other people came to the du Pont Company when they heard about the offer. It is my recollection that in all there were in the neighborhood of 150 of these contacts, some very important, some of very minor importance, in fact, some of no significance at all; the people were not of the nature who could

have gone into this industry. But there is a very representative number of people who did enter these negotiations who were capable because of financial resources and size possibly of entering the industry.

After the first four pages describing the contacts that were made, there appears an appendix to the report, which is a du Pont document offering to these prospects certain information relevant to the cellophane industry. This is a general document of general information, general background information, that anybody would want to have when they first would be considering the possibility of their entry into the field. That is its heading, "Cellophane—preliminary information". It was written by Mr. J. L. Fahs of the Development Department.

10027 Now, there is a recital on the first page of the body of the report of a resolution by the Executive and Finance Committees of the du Pont Company approving the sale of this process under certain conditions. It is noteworthy in this resolution that the subject matter is limited to cellophane and to cellophane caps and bands, the two subjects of this suit, and does not extend to other products in the film department or the then rayon department.

The body of the report reveals that a considerable number of large corporations were originally interested in the offer, but became discouraged upon learning of the magnitude of the investment involved. This fact is stated at page 3.

At page 4 of the appendix attached it is stated that du Pont would not install less than eight machines nor more than sixteen machines in a plant, and the figures there show that this would necessitate an investment of from 21 million to 36 million dollars. At a subsequent point the Government shall have cause to consider the reasons why du Pont was reluctant to install less than eight machines in a plant.

Now, the appendix, also at page 4, shows that the then existing market participation between du Pont and Sylvania

10028 constituted a total capacity of 170 million pounds and a projected capacity of 265 million pounds. It is also stated that a potential market exists of approximately 500 million pounds.

Then with regard to imports, prospective purchasers are advised as follows—and I will recall to the Court's mind Mr. Gesell's statement on imports this morning. Now here is another statement by the du Pont Company concerning imports: "There is not believed to be any prospect of imports to supply the United States market. Foreign producers generally have not kept up with American developments, and the present tariff is 45 per

cent." Now, we do know that since the writing of this document the tariff has been cut to 22½ per cent.

Your Honor will recall probably that during his testimony Mr. Olsen had considerable difficulty in recalling the origin of certain language found in one of the early drafts and in his memorandum of this agreement. If you will turn to page 1 of the appendix, it will be found under this preliminary information disseminated by du Pont the following statement:

"Opportunity: To help to meet the United States need for more cellophane and to reduce the hazard of being charged to have a monopoly of the United States cellophane business, du Pont is interested in having a new competitor established on a substantial scale."

10029 Now, I submit to your Honor that this is almost a verbatim reproduction of the language found in Mr. Olsen's report, which he could not recall where it originated. Well now, I think we have solved that mystery. Here it is right in its preliminary information, and the first time it was every stated to the best of our knowledge was when this was disseminated to these proposed licensees or purchasers of the process.

Government Exhibit 595 contains a report to the Executive Committee on the then pending negotiations with Olin W. R. Grace and Company, and Abitibi Power and Paper Company. A du Pont statement commencing on page 5 of this exhibit we believe speaks for itself, regarding du Pont's motivation for this project. The statement is as follows:

"Du Pont has authorized a cellophane production capacity of 194 million pounds a year. It is reasonable to assume that there will be further increments up to a capacity of approximately 200 million pounds a year. American Viscose has announced its intention of expanding to a capacity of 100 million pounds a year. Others are of the opinion that American Viscose may not reach that much capacity, and probably will not expand beyond it. Therefore, until additional capacity is built, the outlook is for a total U. S. Production capacity of not more than 300 million

10030 pounds a year, of which du Pont will have at least 67 per cent.

"It is still believed that the long-range trend of the cellophane market is toward a potential of 500 million pounds or more a year. The estimated potential market for cellophane takes into account the prospective growth of uses of films of polythene and other materials. Grace and Olin, who have made independent market studies, concur with the belief that additional cellophane capacity can be kept busy.

"Accordingly, there is no qualitative change in the basic considerations that led to the adoption of the resolution of March 17,

1948, on cellophane expansion. However, from the subsequent efforts of the Development Department, it is apparent that Grace is the only prospect in sight that may be interested in proceeding as contemplated by du Pont. The Olin proposition may be another means of diluting du Pont's competitive position, with additional complications and with additional penalties to du Pont. Even if Abitibi should propose to enter the business, a four-machine operation is not likely to be adequate to accomplish the purpose of providing ample supplies of cellophane."

In Government Exhibit 596, a letter from Fahs to Mr. Gladding,
there is a statement of Visking's interest in purchasing the
10031 du Pont process. The final paragraph of the first page
states:

"The Visking representatives asked some questions about starting with a four-casting machine plant. They were told that (a) no data had been developed for such a plant, but it was doubtful that it would be economically sound under United States conditions, and (b) such a project would be less likely to meet our primary objective of establishing substantial competition."

Again, in Government Exhibit 597, regarding the Olin negotiations, Mr. Ford states—and this was in regard to a request by Olin as to whether they could have some help in financing this project from the du Pont Company—

"I passed on the opinion of the Legal Department that any financial participation, whether as a second mortgagee or as a guarantor of a mortgagee, would prevent us fulfilling our principal objective of establishing a wholly independent competitor."

Now, Government Exhibit 584 is a report by the assistant manager of the du Pont planning section to Mr. Karns, Research Director, on February 16, 1949. The subject of this report is "Forecast of 1958 Sales and Transfers." One of the bases upon which this forecast for cellophane is made is stated at page 2 as follows:

"We are assuming that from a legal standpoint we should
10032 not consider du Pont's share of the industry capacity in
excess of 60 per cent. Our position can be altered by future court rulings."

Again, at page 4, speaking of caps and bands, it says:

"As in the case of cellophane, for legal reasons, we are not considering du Pont's share of the industry capacity in excess of 60 per cent."

* * * * *

10114 Mr. GESELL. The thin films report.

The COURT. Yes, the Mitchell report. I am ready to rule that G. X. 583, which is the Mitchell report, should be admitted. However, I announce I am aware of the fact that Dr. Mitchell testi-

fied that his entire experience had been as a research personality with no experience with sales or sales development or promotion.

(The Mitchell report on thin films referred to was received in evidence and marked, "Government Exhibit No. 583".)

10115 Mr. Fitzpatrick. If your Honor please, the Government would at this time like to focus the Court's attention for a few very brief moments on the patent aspects of this case.

* * * * *

10147 Friday, May 23, 1952, 10 O'clock A. M., E. D. S. T.

Present: As before noted.

Mr. Gesell. Your Honor, before Mr. Fitzpatrick starts his discussion, the record at 7196 and 7197 yesterday shows that the Court permitted us to discuss an exhibit which we were to offer on our case. I didn't give it an exhibit number. It should be Defendant's Exhibit 1022, the letter from Mr. Kline to Mr. T. C. Davis, dated February 23, 1949, relating to the loan from Equitable Powder Manufacturing Company. Thank you.

(Letter from Mr. Kline to T. C. Davis, dated February 23, 1949, was received in evidence and marked "Defendant's Exhibit No. 1028.")

Mr. Fitzpatrick. If your Honor please, the Government offers in evidence a letter from W. W. Smith to J. L. Fahs dated July 15, 1948 together with a schedule of a list of patents attached thereto. This document has been marked as Government Exhibit 2919 for identification.

(Letter from W. W. Smith to J. L. Fahs, dated July 15, 1948 was received in evidence and marked "Government Exhibit No. 2919.")

10148 Government offers in evidence Government Exhibit 2920 at page 7853, a letter from Manfred Keller to Mr. Buchanan, dated October 19, 1949.

(Letter from Manfred Keller to Mr. Buchanan dated October 19, 1949 was received in evidence and marked "Government Exhibit No. 2920.")

Government offers in evidence Government Exhibit 2921 at page 7854, an agreement between du Pont, Dobeckman and Kalle, dated September 17, 1930.

Mr. Gesell. Your Honor, we have an objection to 2921.

The Court. What page is that on?

Mr. Gesell. At page 7854. That agreement was amended December 19, 1938, and we think the Government should offer the amendment as well as the initial agreement which was entered into in 1930. I have the amendment here in my hand.

Mr. Fitzpatrick. May I look at the amendment?

The Court. Yes.

Mr. FITZPATRICK. If I may, your Honor, I would then offer this as Government Exhibit 2922.

Mr. GESELL. That is quite satisfactory, your Honor.

(Initial agreement between du Pont, Dobeckman and Kalle dated September 17, 1930, and amended agreement dated December 19, 1938 were received in evidence and marked "Government Exhibit No. 2921 and 2922 respectively.")

10149 Mr. FITZPATRICK. It is a letter to the Dobeckman Company from Mr. B. M. May, dated December 19, 1938, which dated approximately eight years following the execution of the original agreement.

I would refer your Honor's attention to the phrase in the third paragraph of Government Exhibit 2922, which is illustrative of the phrase which du Pont has stricken from the original agreement. That phrase reads, "Dobeckman agrees that in carrying out of the process and operation of said apparatus it will utilize only cellulose sheets made by du Pont."

If your Honor may recall, back at page 5068 of the transcript we promised you that we would offer this agreement between Dobeckman, Kalle and du Pont because the defense had included a letter, Defendant's Exhibit 586, which referred to certain patents which du Pont had acquired and then were licensing to Dobeckman.

I won't go through the story again, unless your Honor wishes me to. It is at page 5068 of the transcript. We feel it is another definite instance of their defense of patent policy.

Mr. GESELL. Just a brief comment on this exhibit because we have no discussed it, Government Exhibit 2921. That is the contract which the Government offers because of a so-called tie-
10150 in clause, your Honor, which appears at 7855. It is a tie-in clause eliminated by the amendment of 38, which is 2922 in evidence. I would point out to your Honor that this is not a tie-in provision, as the Government contends. As 2921 shows, it relates to a process and apparatus for laminating moistureproof cellophane. The requirement of the contract on page 2 in requiring Dobeckman to use du Pont moistureproof cellophane, a patented product—in fact, then not made by anybody else—does not result in a tie-in provision within the cases.

* * * * *

10153 Mr. ROACHE. We now come to Roman numeral VII
10154 of the trial brief, which deals with du Pont's distribution practices. The heading of this Roman numeral on page 22 states that the assertion of the defendant's power to regulate distribution of cellophane and caps and bands whereby marketing outlets were monopolized and purchase of these products was sub-

ject to discriminatory and unfair sales practices reflects intent to maintain and strengthen its market control.

Now, first, I would like to refer to a few of the depositions which are now a matter of record. The particular parts of the depositions that I will refer to fall under paragraph 193 of the trial brief wherein it is charged that du Pont sold cellophane to direct purchasers under a system of discriminatory discount designed to channel sales to du Pont.

Now, reference is made to the deposition of Irving Horn, general purchasing agent for General Foods Corporation and to the Government's cross-examination on pages 36 and 38 and page 40 of the deposition. After giving the percentage and the amounts of rebates received from du Pont by General Foods, on page 36 and 38, Mr. Horn stated on page 40 that the quantity discount did cause his company to channel their purchases of cellophane to du Pont.

Mr. GESELL. Will you tell us where that is, please?

10155 Mr. ROACHE. Page 40.

Mr. GESELL. Will you tell us where on page 40 that appears? Page 40 doesn't even pertain to Horn.

Mr. ROACHE. Previous testimony on pages 36 to 38 had established the fact, your Honor, that this company had purchased their cellophane from du Pont. Then it gave the discounts and the amount of rebate. Then on page 40 the question was asked, "The rate was based on the total yearly purchases, that is, the more you purchased the greater the rebate, is that right?

"Answer: That is correct.

"Question: Would this have a tendency to make you buy all your purchases from one company?

"Answer: Yes, it would."

Mr. GESELL. Your Honor, I think if we are going to read from the deposition, under your Honor's ruling the Government should first direct attention to the statement in the summary which they are challenging as inaccurate because the totality of this tesimony is summarized in the summary of the depositions and deals fully not only with this selected portion of the transcript but the entirety of what the witness said on this subject. As I understand it, unless your Honor's attention is directed to a material inaccuracy, you are going to rely on the summary.

The COURT. That is right.

10156 Mr. GESELL. Now, what portion of this summary is Mr. Roache now contending is inaccurate?

Mr. ROACHE. First, your Honor, the whole deposition is in evidence and under the rules of evidence we have a right to refer to any part as long as the whole deposition is in evidence.

The COURT. I am not going to be driven to read these many thousands of pages if the summary is accurate.

Mr. ROACHE. We claimed at the very outset the summaries were not accurate.

Mr. GESELL. What is the inaccuracy?

The COURT. What is it?

Mr. ROACHE. We feel it does not give proper emphasis to this particular part.

Mr. GESELL. What part doesn't it?

Mr. ROACHE. The part of the summary that deals with this particular part.

Mr. MINICUS. Your Honor, it is not our effort to drive you to read the entire summaries.

The COURT. I am going to read the summaries. I don't want to read the depositions.

Mr. MINICUS. There are a few particular points we would like to bring your Honor's attention to. It is not a matter of
10157 having recourse to the entire deposition, but it is certain places where the question and answers of their own witnesses support our case. We would appreciate the opportunity of bringing this to your attention.

The COURT. Well, if is is just several instances, proceed.

Mr. GESELL. I think I should direct your attention to the totality of this so you can read it against this excerpt.

The COURT. Read it.

Mr. GESELL. It appears at page 77 of the summary. Your Honor will see he is talking in this testimony both about discounts to Sylvania when he bought from Sylvania and discounts from du Pont when he bought from du Pont. The whole testimony is there summarized if your Honor wants to know what it is.

The COURT. Proceed, Mr. Roache.

Mr. ROACHE. I believe, your Honor, in this whole presentation on this distribution I have about six or seven references and that is all.

The COURT. Proceed.

Mr. ROACHE. This was also stated, in substance, in the deposition of Mr. Alexander McCury, manager of the Packaging Division of the Purchasing Department of National Biscuit Company on pages 61 to 64 of the McCurry deposition.

Mr. Roy Hanson, vice-president of Milprint, Incor-
10158 porated, a promotional converter, stated on page 140 of the Hanson deposition that prior to 1939, when converters also received a quantity discount, it was to his company's advantage to buy all their cellophane from one supplier.

Your Honor will recall Mr. Martin's testimony, president of Shellmar Products Company, when he was on the stand and stated

that prior to 1939 his company received a quantity discount and that he did not like the change to a ten per cent discount for all converters because under the quantity discount his company was in a better competitive position than the small converter who did not purchase the quantities that Shellmar purchased.

The next group of five documents to be offered in evidence falls under Paragraphs 194 and also 196 on page 23 of the trial brief.

Paragraph 194 charges that the indirect sales of cellophane were made subject to restrictive understandings and agreements designed to maintain du Pont as the dominant source of supply to buyers for resale; and paragraph 196 charges that to further its own ends and protect its purchasers from competition du Pont often refused to sell to certain users.

10159 As part of its proof of paragraph 194 the Government contended and showed that du Pont always pursued a selective policy with regard to converters selling only to the more desirable and most cooperative of the converters.

The defendants, in its case, attempted to disprove this. Reference is made to pages 4750 to 4752; pages 4743 to 4744; pages 4746 to 4747, and pages 4748 to 4749 of the transcript.

Now, to further show an actual carrying out of this policy in line with the Government's proof especially where, in Government Exhibit 5047, du Pont stated that the Daniels Manufacturing Company was a Sylvania converter and a cut-price operator and therefore felt it unwise to put Daniels in a position to compete directly with the du Pont converters.

The Government offers in evidence Government Exhibit 5569 at page 7869, and 5569A, a typewritten copy of 5569 at page 7870.

(Letter dated March 10, 1933 to du Pont Cellophane Company from Daniels Manufacturing Company was received in evidence and marked "Government Exhibit No. 5569 and 5569A.")

Government offers in evidence Government Exhibit 5570 at page 7871.

(Letter dated March 30, 1933 to Daniels Manufacturing Company from R. B. Brown, was received in evidence and marked "Government Exhibit No. 5570.")

10160 Government offers in evidence Government Exhibit 5571 at page 7872 and Government Exhibit 5571A, a typewritten copy of 5571, at page 7873.

(Letter dated January 18, 1934, to du Pont Cellophane Company from Daniels Manufacturing Company was received in evidence and marked "Government Exhibit No. 5571 and 5571A.")

The Government offers in evidence Government Exhibit 5572 at page 7874 and Government Exhibit 5572A, a typewritten copy of 5572, at page 7875.

(Telegram dated January 19, 1934 to Daniels Manufacturing Company from R. B. Brown was received in evidence and marked "Government Exhibit 5572 and 5572A.")

Mr. GESELL. We object to the materiality of these documents. This is a group of five exhibits which show du Pont refused to sell to Daniels Manufacturing Company, a Sylvania converter. None of the documents show any reason for the refusal to sell. They are simply orders and refusals to fill orders. I can't see what the materiality of that is to the issues in this case.

The COURT. Will you state the materiality, Mr. Roache?

Mr. ROACHE. In their own defense, on the pages we have noted, they stated that they never refused to sell to anybody; that they were out looking for converters and constantly on the search
10161 for people looking to sell their products.

Mr. GESELL. Will you give me the page?

Mr. ROACHE. Pages 4750 to 4752, 4743 to 4744, 4746 to 4747 and 4748 to 4749.

Mr. GESELL. Those don't show we said we never refused to sell to a converter.

Mr. ROACHE. They state that they were always on the search for converters, always trying to find new ones, and here is an instance where that wasn't true. It is a big converter. It is a converter that could really sell some cellophane for du Pont, one they often refer to in their defense.

Mr. GESELL. These documents are shown in 1933 and 1934.

Mr. ROACHE. It was an arbitrary selection on the part of du Pont as to the converters they wanted to use. Now, I am showing documents that they refused to sell to Daniels.

Mr. GESELL. No reasons are shown. There is nothing with respect to the reasons, your Honor, for these refusals to sell. There is no reason why we should sell or should not sell. What its relation to the monopoly case is, unless you can show motive or purpose or effect, and they haven't shown motive, purpose, and effect, I don't know.

Mr. ROACHE. Your Honor, these documents dated
10162 1933 and 1934 show du Pont refused to sell to Daniels.

The Government Exhibit 5647 is dated ten years later but it gives the reason why they didn't want to, because they wanted to protect their own converters.

The COURT. I don't get the implication of the documents, but I am going to let them in anyhow.

Mr. GESELL. I don't get their implication either.

Mr. ROACHE. Government Exhibit 5569 is a letter from Daniels Manufacturing Company to du Pont Cellophane Company dated March 10, 1933, wherein Daniels asks du Pont to quote its prices on various types and quantities of du Pont cellophane.

(Letter from Daniels Manufacturing Company to du Pont Cellophane Company, dated March 10, 1933 was received in evidence and marked "Government Exhibit 5569.")

Government Exhibit 5570 is a reply letter from R. B. Brown of du Pont to Daniels Manufacturing Company dated March 30, 1933 wherein Du Pont tells Daniels it is not interested in selling Daniels cellophane at the present time for conversion purposes.

(Letter from R. B. Brown to Daniels Manufacturing Company dated March 30, 1933, was received in evidence and marked "Government Exhibit 5570.")

Government Exhibit 5571 is a telegram from Daniels Manufacturing Company to du Pont Cellophane Company, dated
10163 January 18, 1934, asking if du Pont can express to Daniels 200 pounds 18-inch 300 moistureproof heat sealing cellophane.

(Telegram from Daniels Manufacturing Company to du Pont Cellophane Company dated January 18, 1934, was received in evidence and marked "Government Exhibit No. 5571.")

Government Exhibit No. 5572 is a telegram from R. B. Brown of du Pont to Daniels Manufacturing Company, dated January 19, 1934, stating that du Pont cannot make shipment and refers Daniels to du Pont's letter of March 13, 1933, in which du Pont stated it was not interested in selling to Daniels.

(Telegram from R. B. Brown to Daniels Manufacturing Company dated January 19, 1934 was received in evidence and marked "Government Exhibit 5572.")

Mr. GESELL. With respect to this group, your Honor, two comments. One, Government Exhibit 5046 shows that in 1933 du Pont took on three additional converters; in 1932 five additional converters; in 1934 two additional converters. As far as that is concerned, there was a change in growing development of converter business.

I call your attention to Defendant's Exhibit 1015A and B which show examples of Sylvania's refusal to sell a converter.

Mr. ROACHE. Government offers in evidence Govern-
10164 ment Exhibit 5573 at page 7876. This exhibit shows that this policy of selectivity and refusal to sell only to the more desirable converters continued until about 1949.

(Milprint memorandum dated March 31, 1949 was received in evidence and marked "Government Exhibit No. 5573.")

Government Exhibit 5573, formerly identified and marked for identification as Government Plaintiff Hanson No. 11 was written by Roy E. Hanson, vice-president of Milprint, Incorporated, and addressed to Bert T. Hefter, Shy Rosen, L. R. Zimmerman and Herman Gronauer, dated March 31, 1949.

In this letter Dr. Hanson is reporting a meeting he had with Mr. Lake of du Pont, and what Mr. Lake had to say, and the second and third paragraphs read as follows:

"He called our attention to the situation that confronts them with regard to the monopoly suit and called our attention to the fact that now that the situation is loosening up and that at the moment at least the supply is highly in excess of the demand, they have no alternative but to sell converters who have been making a serious bid to purchase cellophane.

"That means that many of the small fly-by-night converters who, in the past, have had difficulty in getting enough material
10165 will now be more serious competition than they ever were and our selling job is going to be that much greater."

Now, while presenting its case in chief the Government showed in detail various indirect sales distribution practices of du Pont. The Government charged, and it appears on page 3620 of the transcript, that promotional converters were granted technical and merchandising assistance and given other forms of assistance that were not available to fabricators and to source converters.

Mr. GESELL. Are you leaving Exhibit 5573?

Mr. ROACHE. No.

Mr. GESELL. You are still on Exhibit 5573?

Mr. ROACHE. I have passed 5573.

Mr. GESELL. I think we ought to comment as we go along.

Mr. MINICUS. This is all the subject matter at the head of distribution. We will never get through if we are going to stop and discuss each individual document. Mr. Roache is now on the subject of distribution. In about two hours he will finish the subject of distribution and I think it can be covered at that time. I don't think we should debate it now.

Mr. GESELL. I don't intend to debate it, but if I may make a statement with respect to the material that is presented here,
10166 we have a series of documents each one of them a little event. They don't have any continuity or any particular relationship. Here is the situation on 5573. A witness testified to the meaning of this document. The Government has failed to call your attention to the fact that there is testimony in evidence about this document.

In terms of developing the transcript isn't it better for me as we go through each of these to point out what the complete record is with respect to it?

The COURT. I think that would be more helpful to me when I come to read the testimony because it will tie in cross-references.

Mr. GESELL. Exactly. I want to state that at page 267 and 268 of the summary of depositions summarized, Mr. Hanson's testi-

mony concerning this document he wrote, and at the top of page 268 it is clear from the record that he said this, that this letter had nothing to do with the policy of not selling small converters.

The COURT. Proceed, Mr. Roache.

Mr. ROACHE. In line with that I would like to call your Honor's attention to the fact that this is their own witness and these are documents we confronted their witnesss with and had him authenticate them.

In our case in chief we had shown that promotional converters were granted technical and merchandising assis-
10167 tance and given other forms of assistance that were not available to fabricators and to source converters, and that our charge relative to this appeared on page 3260 of the transcript.

The defense, on page 4755 of the transcript, states that defendant Exhibit 455 to Defendant's Exhibit 490 are being put in solely for the purpose to negate the position taken by the Anti-trust Division at page 3620 of the transcript.

The Government only offers in evidence documents post-complaint to show that this policy continued of assisting particular converters.

In rebuttal, the Government offers in evidence Government Exhibit 5574 at page 7877, a du Pont memorandum from R. J. Crowley to E. C. Lake, dated December 21, 1950, entitled "Converter Cooperation"; and also offers Government Exhibit 5575 at page 7878 which is a du Pont memorandum from L. B. Steele to E. C. Lake, dated April 20, 1951, entitled "Converter Contacts."

Mr. GESELL. I object to both of those on the grounds of materiality. Throughout the case the Government has reiterated and reiterate that the services given one class of converters were different than the services given another.

Now, they offer two documents and say this shows
10168 the policy continues. All these documents show is that services were given these particular converters. There is no comparison made and there is no comparison in these documents. I say, therefore, they are not material to the issues in this case.

Mr. ROACHE. I would like to call your Honor's attention to 5575, and if your Honor will recall, there was quite a bit of discussion during our presentation relative to an advertising allowance that was given to the promotional converters and to preferred converters. That was discontinued and there was a constant bickering back and forth after that relative to converters trying to get back those advertising allowances. They never did get them back.

This document shows that du Pont got together with the big three and together they planned their advertising programs, that

each put before the other what they were intending to concentrate on and thereby each was able to save itself a lot of duplication in their policy of pushing du Pont cellophane.

I feel, your Honor, that in a way that also is an advertising aid to these big converters. It may not be a rebate but it certainly did save them some money in duplication of advertising.

Mr. GESELL. That points up the very objection I
10169 am making. There is no showing this wasn't done with the other converters.

Mr. ROACHE. Mr. Gesell can't show that it was.

Mr. GESELL. There is a constant effort here to make this comparison. We have already litigated this issue twice in this case, and this does not point up any discrimination or difference as between converters. Therefore I say it is immaterial.

Mr. ROACHE. I cannot see how it could be immaterial. The very title shows converter cooperation. That establishes the materiality right there.

Mr. GESELL. There is nothing wrong about cooperation.

Mr. ROACHE. Depending on how it is given out.

The COURT. Objection sustained.

Mr. ROACHE. We move now, your Honor, to the Government's contention that the charges made in 1939 relative to discounts and methods of distribution were arbitrarily made and were discriminatory.

In 1939 du Pont divided its converters into three separate groups, promotional converter, regular converter and fabricators. Now, the converters represented by far the greater percentage of indirect sales and, as has been shown by many exhibits now in evidence, the converters were favored over the fabricators
10170 and received a much higher discount on purchases of cellophane than did the fabricators. However, these so-called fabricators were formerly converters and they still converted cellophane. They still made something out of the cellophane purchased from du Pont, and the completed article was still cellophane.

The Government contends that this division of converters into two classes, converters and fabricators was discriminatory and was an arbitrary distinction done to help maintain du Pont's dominant position.

This rebuts the defendant's contention that they did not favor converters over others and that the outlets, distribution outlets, were not controlled. This appears at page 4748 of the transcript.

I would like to refer once again, as I did before, to the depositions. I refer to the deposition of Samuel Leeds, president of Cellu-Craft Corporation. This company is important on this point, your Honor, because Cellu-Craft was both a fabricator,

and later a converter. The pertinent part of the testimony appears at pages 53, 54, and also 56 of the deposition. Mr. Leeds was asked on cross-examination what the difference was between a fabricator and a converter. He stated that fabrication was converting on a hand operation and semi-automatic operations, and that it was the same type of work as was done by the so-called converters except that fabricators were doing a
10171 hand or semi-automatic operation whereas converters were those with machine operated plants. He said that when his company became a machine operated plant replacing the former hand operation, he was able to get a converter discount, and the converter discount at that time was ten per cent as compared to the fabricator three per cent, and they both turned out, according to him, the same end product and did the same job, one hand and one machine. One got ten and one got three.

I refer again, your Honor, to the deposition of Roy E. Hanson, vice president of Milprint, Inc., which company, your Honor will remember, was a promotional converter and one of the big three.

The pertinent part appears on pages 198 and 199. Mr. Hanson was asked:

"Mr. Hanson, do you know the difference between a converter and a fabricator?

"Answer: I would say that a fabricator was a primary manufacturer. He might use the term synonymously or it might have indicated a fabricator is a primary manufacturer and a converter is a processor of material. We generally refer to a fabricator in connection with revelation material as a fabricator, somebody who puts the material together or fabricates the waxpaper and the cellophane generally.

10172 "Question: I don't understand, Mr. Hanson.

"Answer: Frankly, I don't understand a great deal of the difference between the two either. We may have used one or the other terms loosely. There is no question in my mind what a converter is. A converter is a man who takes packaging material and processes it into some other shape or form. A fabricator, generally speaking, would be somewhat the same or might be the same."

If your Honor will recall when Mr. Burt Martin, president of Shellmar Products Corporation, another of the big three converters, was on the stand, he also could not tell the difference between a fabricator and a converter. He described the operation of a fabricator as being the same as a converter, stating that some people call it converting and some people call it fabricating. This appears at 6426 of the transcript.

The Government introduces into evidence Government Exhibit

5576 at page 7879 and Government 5576A, which is a typewritten copy of 5576.

(Letter from Humitube Manufacturing Company to E. C. Lake, dated November 22, 1940, and typewritten copy thereof were received in evidence and marked "Government Exhibits No. 5576 and 5576A.")

Mr. ROACHE. This exhibit shows how one of du Pont's
10173 fabricators felt about *is* classification. This document was written by H. J. Neumiller, president of Humitube Manufacturing Company, to E. C. Lake, of du Pont, dated November 22, 1940. The first part of the latter tells *u*f Humitube's enthusiasm for its product, 'Glassips,' and also the heavy expense that has been entailed in promoting the product. *The* starting at the fourth parag.aph it reads:

"The intent of this letter is to ask your serious consideration of putting 'Glassips' under the Promotional Converter Plan. We feel this is definitely as much to your advantage as ours. We probably spend more on advertising than Glassips, Inc. do but nonetheless it is our firm belief this type of merchandise should also come under the Promotional Converter Plan.

"Aside from th*a* above argument, we are always questioned by the auditors in our annual audit the somewhat unique situation of having the same material in our plant at two different places.

"Again, Ed, I would appreciate your consideration of putting this under the Promotional Converter Agreement Plan."

The Government introduces into evidence Government Exhibit 5577, at page 7881 and 5557-A at page 7882, which is a typewritten copy of 5577.

(Letter from E. C. Lake to Humitube Manufacturing
10174 Company dated December 5, 1940 and typewritten copy thereof were received in evidence and marked, "Government Exhibit No. 5577 and 5577-A.")

Mr. ROACHE. This is a letter from E. C. Lake of du Pont to the Humitube Manufacturing Company, attention of H. J. Neumiller, president, dated December 5, 1940. In this letter Mr. Lake refuses Humitube's request, stating that it would not be good business practice to make an exception for Humitube.

Mr. GESELL. Now, with respect to this group, your Honor, may I hand up the two packages of straws. (handing to Court). Those are Glassips, your Honor, referred to in 5576. One of them is made by Humitube, a cigar tube converter, who also does that fabricating work, and the author of 5576.

The other is made by a company in Townsend, Maryland, called "Glassips, Inc.", a fabricator.

Here is what the situation was in simple terms: du Pont had two different discounts, a discount for converters and a different dis-

count for fabricators. Those were functional discounts. They reflected the functional differences between converting, which was the making of packaging materials, and fabricating, which was the making of other types of articles that don't compete with packaging materials such as those straws that your Honor has in his hand.

10175 Now, those are two separate and distinct functional discounts recognized under the Robinson-Patman Act as proper, and here came along a converter who made cigar tubes, the packaging of cigars, and he asked to have the higher discount allowed to him for his straws. And if we had given him a converter discount on his fabricating job, the straws, we would have discriminated in his favor and against Glassips, Inc. And as 5577 shows, we refused to do that, and we maintained strictly our functional discount differentiation between converters and fabricators, and that is all there is to this whole story.

The Government constantly says that this shows that we were doing something to promote a dominant position. It doesn't show any such thing, and this questioning on the deposition of Mr. Leeds and Mr. Hanson and others, asking them what they understood to be a fabricator, or what they understood to be a converter, had nothing to do with the basis upon which du Pont was determining its functional discounts. It makes no difference what those terms meant in the trade, provided, under the Robinson-Patman Law the functional distinction was justified. And since the makers of the straws do not compete with the makers of packaging materials, there is nothing under the Robinson-Patman Law or any other law which makes it improper to have two different functional discounts.

10176 Mr. ROACHE. Now, your Honor, we move down to paragraph 197 of the trial brief, which states that the defendant imposed numerous restrictions on the resale of its cellophane and caps and bands.

Under this the Government charged that one of these restrictions was the imposition of a uniform resale price among the so-called agents or jobbers.

The defendant offered evidence to refute this on pages 4758 to 4761, and also the documentary evidence, Defendant's Exhibits 491 to 501.

In rebuttal to this the Government introduces into evidence Government Exhibit 5578 at page 7883. This is a du Pont letter from C. F. Brown, director of sales, to H. D. Catty, of H. D. Catty Corporation of New York, dated September 29, 1941.

(Letter from C. F. Brown to H. D. Catty, dated September 29, 1941 was received in evidence and marked, "Government Exhibit No. 5578.")

Mr. ROACHE. The letter states that du Pont is notifying all direct trade that on November 1, 1941, cash discounts will be eliminated and that present conditions necessitate the elimination of the cash discount which must of necessity be uniform in all cases.

Then the Government introduces in evidence Government
10177 Exhibit No. 5579 at page 7884. This is a du Pont letter from E. C. Lake, assistant director of sales to Diem & Wing Paper Company, dated October 31, 1941.

(Letter from E. C. Lake to Diem & Wing Paper Company, dated October 31, 1941, was received in evidence and marked "Government Exhibit No. 5579.")

Mr. ROACHE. Diem & Wing is a jobber of cellophane. The letter states that there is enclosed the new jobber price list for cellophane, effective November 1, 1941. It calls attention to three changes, one as to the area increase per pound of cellophane; the second as to the reduction of price of cut-to-size sheets and the discontinuance of prices on stock size sheets; and third, an important change, for this point is, and I quote, "3. Cash discount, two per cent ten days has been discontinued; terms now thirty days net."

The next two paragraphs read:

"Many jobbers have told us that a cash discount of two per cent ten days is an established practice with their trade on all products handled and hence it would be impractical to resell cellophane on a net basis.

In order to conserve present margin of profit on resale, we therefore are recommending to all jobbers that they maintain the two per cent cash discount and adopt a resale schedule sufficiently higher to compensate therefor."

The next paragraph explains how this can be done.

10178 Then the last two paragraphs on page 7885 state:

"We are attaching price sheet which we are suggesting be used as a guide in preparing salesmen's price sheets by all jobbers who resell our product.

"Particularly under present conditions, in which the supply of cellophane is limited and all customers are on allocation, we believe the recommended action should be generally acceptable and effective."

* * * * * *

10181 Mr. GESELL. Now, with respect to that group, your Honor, we have two or three comments.

5578 was the first in the group, a letter from Mr. Brown of du Pont to the Catty Corporation—that is at page 7883. Emphasis was placed upon the last paragraph, which says:

10182 "Present conditions necessitate the elimination of the cash discount which must of necessity be uniform in all cases." And that is offered to you as proof of resale price fixing.

D. X. 308 shows that at this time du Pont was eliminating its discount across the board to all classes and types of trade. That appears as to converters in G. X. 5096 and as to fabricators in G. X. 5406. This has nothing to do with resale prices but is merely a statement by du Pont that across the board to all classes of its trade it is eliminating its cash discount, so there is nothing to that.

5579, the letter to Diem and Wing Paper Company, is a recommendation of a resale price schedule and nothing more. It is a recommended price schedule to a jobber. The Colgate and Beech-Nut cases make clear that recommended resale prices are not violative of the Anti-Trust laws.

As far as 5567 is concerned, it turns out my hunch was right, that they were relying on the third paragraph from the bottom, which they think contains implications of price fixing. And what does the letter that is now in evidence as 5567–A say? That is the letter of January 30, which is referred to in that paragraph. That letter says:

10183 "In particular reference to the last paragraph of your letter, insofar as we are concerned, your organization can charge whatever price you care to."

Mr. ROACHE. The remainder of the documents to be introduced into evidence under Section VII of the trial brief are of such a nature that they fall under both paragraphs 198 and 199. These paragraphs state that du Pont's control over the marketing outlets is clearly evidenced by its arbitrary treatment of its customers, and 199, that in addition to these restraints du Pont participated in discriminatory relations with the indirect sales customers in order to maintain its sales position.

Now, du Pont's evidence addressed to the refutation of this appears on pages 4739 to 4750 of the transcript and 4758 to 4761.

The Government offers into evidence Government Exhibit 5580 at page 7888, a letter from E. C. Lake, Assistant Director of Sales of du Pont to Zellerbach Paper Company, dated May 29, 1936, attention Sidney L. Lee, Headquarters, Sales Department.

(Letter from E. C. Lake to Zellerbach Paper Company, dated May 29, 1936, was received in evidence and marked, "Government Exhibit No. 5580".)

Mr. ROACHE. In the first paragraph of the letter Mr. Lake refers to Zellerbach's letter of May 21, where permission of du Pont was

10184 asked so Zellerbach could sell items made of competitive transparent cellulose. Mr. Lake states that although the inquiry involves flameproof material, that du Pont does not

manufacture, still du Pont expects to have such an item in the future.

Then the third and fourth paragraphs state:

"As a matter of general policy, we are very opposed to having any of our agents or converters who are regarded as distributors of Cellophane regardless of form in any way interested in the sale of transparent film competitive to Cellophane.

"Since you are already acquainted with our wishes and the policy applying to this subject, it is difficult for us to understand why you wrote us. We expect you to confine your sales of transparent material to Cellophane as your part in carrying out the spirit of our mutually successful, pleasant and cooperative working arrangement."

The Government introduces into evidence Government Exhibit 5581 at page 7889, letter from E. C. Lake, of du Pont, to the Traver Corporation, attention of George W. Traver, President, dated December 21, 1938.

(Letter from E. C. Lake to Traver Corporation dated December 21, 1938, was received in evidence and marked "Government Exhibit No. 5581".)

Mr. ROACHE. The letter reads:

"Your advice to your sales organization offering for sale
10185 plain, unprinted "Cellophane" in sheet and roll form came as a surprise, and we are wondering what motivated this thought.

"Our selling terms to you as a converter have no provisions for your re-selling 'Cellophane' in unconverted form. For many reasons, the sale and distribution of unconverted 'Cellophane' by printers and bag makers is impractical; nor do we see any opportunity for adding additional distributors at present.

"Therefore, we ask your cooperation in having the sale of plain, unprinted 'Cellophane' in sheet and roll form rescinded."

The next group of eight documents to be introduced, your Honor, tell of how Milprint, a promotional converter, complainted about du Pont permitting first H. D. Catty of New York and later Brooks Paper Company, both formerly jobbers of cellophane, to convert cellophane as well as job it. Milprint feels it is not getting fair treatment from du Pont as it can only convert cellophane.

The documents show how, over a course of years, Milprint complained about the situation and continually asked du Pont for the right to job cellophane as well as convert it. The documents start in August of——

Mr. GESELL. Don't you think you ought to offer them before you describe them too much? Most of them are inadmissible.

10186 Mr. ROACHE. I am going to offer them. The documents start in August of 1944 with Milprint's first request to job

as well as convert, and they end in 1947 with Milprint still asking why it can not also job cellophane.

Now, if your Honor will recall, Mr. Gesell made the statement, and it appears on page 3798 of the transcript, that if a converter wished to do something else with the cellophane it purchased, besides converting it, all the converter had to do was sign another type of agreement. These documents will show that certainly was not the situation. These documents, of course, also evidence du Pont's control over the distribution of cellophane.

The Government introduces into evidence Government Exhibit 5582 at page 7890, formerly identified as Plaintiff's Hanson's Number 13, which is a letter from William Heller, Vice President of Milprint, Inc., to E. C. Lake, converter section of du Pont, dated August 11, 1944.

10187 Mr. GESELL. I would like, if your Honor please, to let him offer this whole group and then take up the objections with respect to each of them. Many of them have common objections.

Mr. ROACHE. Do I have to offer the whole group, your Honor?

The COURT. You do what you please.

Mr. ROACHE. I am offering them individually.

The COURT. All right.

Mr. GESELL. They are all exhibits developed on the Hanson deposition. They have many common questions, and it seems to me more simple to deal with them as a group.

The COURT. Let the offer be made individually according to Mr. Roache's wishes, but reservation to you to move to strike them if they contain any infirmities.

Mr. GESELL. That will result in my talking about inadmissible evidence. It will just take much longer, won't it? Let us take them up as he puts them in.

Exhibit 5582 has not been authenticated. We object to it on the grounds of lack of authentication.

The COURT. What is your answer to that?

Mr. ROACHE. I am going to show you where it was authenticated in the deposition.

The COURT. All right.

Mr. ROACHE. On page 182 of the Hanson deposition:

10188 "Question: I show you a photostatic copy of one of your company's letters selected by the F. B. I. written by Bert Hefter, addressed to Roy Hanson, dated August 7, 1944. (Handing document to the witness.) Is that a true copy of one of your company's letters?

"Answer: I would say so, yes.

"Question: Is it a true copy of a letter sent by Bert Hefter to you?

"Answer: I would say so.

"Mr. Roache. I offer this in evidence, and ask it be marked Plaintiffs' Hanson Exhibit No. 12, for identification."

Mr. Gesell. That is not this document. This is Hanson 13, so you better try again.

Mr. Roache. "Question: I show you photostatic copy of one of your company's letters selected by the F. B. I., written by William Heller to Lake, dated August 11, 1944. (Handing document to the witness.)"

The Court. Where is this in the deposition?

Mr. Roache. It follows the other right on page 182, at the bottom.

"Is that a photostatic copy of one of your company's letters?

"Answer: Yes, I would say so.

10189 "Is it a true copy of a letter sent by William Heller to Mr. Lake?

"Answer: I would say so.

"Mr. Roache. I offer this in evidence, and ask it be marked Plaintiffs' Hanson Exhibit No. 13."

On page 246 of the deposition Mr. Hanson stated that he felt all the officials of his organization wrote truth in their letters.

Mr. Gesell. Referring to page 209, Mr. Acheson's redirect examination:

"Question: Mr. Hanson, there are a number of letters in this pile of letters given to you to read on your cross-examination that were not written to you or written by you?"

"Answer: That is right.

"Question: Did you mean to leave the impression that you could definitely say that those letters were genuinely and authentically what they purport to be?

"Answer: No, obviously I couldn't. A good share of that correspondence I have seen for the first time here today."

Mr. Roache. That is why I mention to you page 246, because Mr. Hanson stated he thought they all wrote truths. Whether he saw it or not he felt it was the truth.

The Court. I am not interested in his feelings. I am in-

10190 terested in his knowledge of facts and apparently he didn't have them as shown by 210.

Mr. Roache. He identified it as a letter written by that individual and sent, and actually stated he felt it was sent by William Heller to Mr. Lake.

Mr. Minicus. We are only on authentication, and it seems to me the witness that identified this as having signed that was under him in his organization.

Mr. GESELL. It is not signed. This fellow, if anything, was over him, wasn't he?

Mr. ROACHE. Mr. Hanson identified it as being sent to Mr. Lake.

The COURT. I don't think there is sufficient identification. Objection sustained. That is Government Exhibit 5582.

Mr. ROACHE. The Government offers in evidence Government Exhibit 5583 at page 7891 identified as Plaintiffs' Hanson No. 22. This is a letter from William Heller, vice-president of Milprint, to E. C. Lake dated November 15, 1945.

Mr. GESELL. We have no objection to that.

(Letter from William Heller to E. C. Lake, dated November 15, 1945, was received in evidence and marked "Government Exhibit No. 5583.")

Mr. ROACHE. In this letter Mr. Heller complains that
10191 Brooks Paper Company, a jobber in the Mid-west area, was also making cellophane bags, which was and is a converter function. Mr. Heller states that this is wrong and appeals for relief from the situation.

10192 Mr. ROACHE. The Government offers into evidence Government Exhibit——

Mr. GESELL. Can we take them up one at a time, your Honor?

Mr. ROACHE. That is what we are doing.

Mr. GESELL. On 5583, if your Honor please, I simply want to call attention to the hand written notes that appear on there by Mr. Lake and to the discussion of the exhibit that appears at page 269 of the summary.

Mr. ROACHE. The Government offers into evidence Government Exhibit 5584 at page 7892, formerly identified as Plaintiff's Hanson No. 15.

This is a letter from Roy E. Hanson, Vice-President, Milprint, to E. C. Lake, dated April 18, 1946. In this letter Mr. Hanson asks Mr. Lake that inasmuch as H. D. Catty and Brooks Paper Company both are converters, to whom does Milprint now refer inquiries for small quantities of unprinted cellophane. In the past these inquiries were turned over to Catty, but Milprint certainly doesn't want to do that now.

The third paragraph states: "It seems to me that Catty ought to be one thing or the other—if they are handling plain Cellophane, they shouldn't be handling convertd material, or vice versa."

Do you want to comment on that?

10193 Mr. GESELL. At page 268 of the summary and over the top of page 269 you will see Mr. Hanson's discussion of

cerned it has to do with foil, foil packaging section, flexible and rigid package container section, cellophane packaging section. You will note that there is a separate and distinct Industry Advisory Committee——

The COURT. Well, I suppose foil is made out of a different raw material than cellophane?

Mr. GESELL. It is, your Honor, a different material.

Mr. RENNINGER. In Government Exhibit 6027 and 6028, you will see that there is a flexible plastic container Industry Advisory Committee, made up of various of the large converters. 6028 shows that there is an entirely separate Industry Advisory Committee for the cellophane manufacturers.

10233 The COURT. Well, advise me later. It seems to me we are wasting our time. See if they are in the Federal Register, and if so, under the Statute I have got to look that up. But, as you say, what is the relevance?

Mr. GESELL. Exactly.

The COURT. And, Mr. Renninger, when you advise me by letter as to what you have found out, then I will make my ruling.

Mr. RENNINGER. Yes, sir.

Mr. GESELL. I don't challenge their authenticity at all.

The COURT. We are not going into that.

Mr. RENNINGER. What are some of the characteristics that make cellophane unique and a separate, distinct product? In the first place, the prices at which cellophane is sold in the market place set it apart as a separate and distinct commodity. If this were not so, the manufacturers of cellophane would not be able to sell a pound of material when it costs so much more than kraft paper or wax paper or glassine, and things of that sort.

We have seen from Defendant's Exhibits 994 and 995, the Heller price study and chart, that the prices of cellophane have always occupied a range between those of the paper packaging materials,

10234 which are lower in price than cellophane, and the newer plastic films, like saran, pliofilm and polythene, and also foil, which are definitely higher in price than cellophane.

A distinctive price structure or range for a particular commodity is additional evidence that it possesses a market of its own distinct from that of other commodities. This fact of price differences between two or more groups of commodities also is evidence that they are not in direct price competition.

In the markets price is a reflection of supply and demand conditions. In the case of cellophane, with its arbitrarily controlled supply and price factors, by reason of a large producer, the fact that its prices have ranged consistently between those of the papers and those of the plastic films indicate the care that has been taken

to keep its market position price-wise clearly distinguishable from these other products.

Other exhibits already in evidence point out the difference in price, that is, the plastic films and the foil are higher in price than cellophane and the papers are lower.

The depositions also all bring this out—Jakes, Hanson, Horn and McCurry, all show that the paper products are all lower in cost than cellophane, where foil and the plastic transparent films are much higher in price than cellophane.

10235 Torrence, of the Aluminum Company of America, when discussing the cost of aluminum foil, stated that to laminate foil costs approximately one-third more than the base price of .00035 aluminum foil, and to coat foil doubles the price of foil.

Government Exhibit 6006, a memorandum from Mr. Benger to Mr. Hatt, states:

"It should be recognized in the first place that we know of no non-viscose film, except methyl cellulose, which is competitive with cellophane in cost."

Government Exhibit 6007, a Development Section report dated March 1, 1940, on page 7 gives various film prices, all much higher than cellophane.

In addition to price, cellophane's physical characteristics not only set cellophane apart as a separate, distinct product, but they also explain this consumer preference and constantly expanding market demand. These characteristics are numerous, but it is sufficient for this case to consider primarily cellophane's better than average protection, its transparency, its brilliant light reflecting surface, which attracts the eye and attention of the buyers, and its moisture-protecting qualities when coated. They distinguish cellophane both from paper products and also from the new plastic film products whose physical characteristics vary in nu-

10236 merous ways and degrees from those of cellophane and among themselves.

It is not the Government's contention that certain of these other flexible packaging materials named by the defendant as being in competition with cellophane do not have one or more of the important characteristics of cellophane. Nor is it the Government's contention that for certain end uses these other materials perhaps may be superior to cellophane as to certain characteristics. However, the Government does contend, and defies the defendant to prove that any of these flexible packaging materials have all the characteristics of cellophane.

Under the theory of Section 2 of the Sherman Act, it is not necessary to go into the various ramifications and all the minute characteristics of each one of these flexible packaging materials.

Under the theory expressed in all the cases heretofore cited on the question of substitute materials, it is sufficient if the product under consideration is unique, or, to put it another way, a separate, distinct product. The proof is upon the defendant to show that all of the other flexible packaging materials have exactly the same characteristics and the same consumer acceptance as cellophane.

10237 Because of cellophane's unique characteristics a consumer preference has developed for cellophane with regard to certain uses which set it apart from all other wrappers so that for those uses there is no adequate substitute. In this connection the long and persistent shortage for cellophane must be borne in mind. This consumer preference is so strong that we have seen that customers are willing to pay a premium in order to get it for wrapping its products. This consumer preference is found to have been established on several factual bases. First there is the protective qualities of cellophane.

The Government's position in this regard is that cellophane, by virtue of its inherent characteristics, gives equal or greater protection to the products which are wrapped in it. This proposition can be established by defendants' documents and the testimony of the defense witnesses which are already in evidence.

Most of this evidence is concerned with the physical properties of cellophane in comparison with those of other wrappers. The objective here is not to establish that cellophane is superior to every other material involved as to each particular physical characteristic, but to prove that cellophane loses one of its consumer preference because of these qualities. It is believed, however, that with regard to many of these so-called substitutes

10238 the superior characteristics of cellophane is most striking.

The defendant has introduced various documents show the distinctive characteristics of cellophane and each of its eleven selected packaging materials as far as protection is concerned.

It is not our purpose at this time to again discuss all the various protective features of these products. However, more specifically, these materials may be said to fall within three groups. One is generally known and classified as the paper group, which comprises waxpaper, vegetable parchment, glassine, and greaseproof papers. The second recognized grouping is the film group, which includes cellophane and such plastic films as polyethylene, saran, pliofilm and so forth. The third group, more or less by itself, consists of aluminum and other foils. This, incidentally, is also the manner in which the Modern Packaging Encyclopedia separates the flexible packaging materials, papers, foil, and films.

For a more complete classification of the physical characteristics of the papers, Government Exhibit 6003——

The COURT. Do you have the page of that?

Mr. RENNINGER. 7919.

Mr. GESELL. It is the first one.

The COURT. Thank you very much. What is the source of this?

10239 Mr. RENNINGER. Modern Packaging Encyclopedia, your Honor.

This describes the physical characteristics of each of the various papers and is introduced solely as a ready reference for a description of the various papers used as flexible wrapping materials. The Government feels that this chart gives a more complete and accurate description than does the general statements of Mr. Southwick, introduced as Defendants' Exhibit 1008A.

Government Exhibit 6004, previously identified as Government Exhibit Nelson Exhibit No. 1 for identification, is a pamphlet issued by the Glassine and Greaseproof Manufacturers' Association. This exhibit describes what the association considers to be the unique characteristics of glassine and greaseproof papers, stating on pages 4 and 5 of the exhibit: "What are glassine and greaseproof?

"To answer this question we must talk briefly about paper. We all recognize that this is very much an age of paper. America consumes only two things in greater quantities per capita than paper. These are water and milk."

The COURT. Is that a fact?

Mr. RENNINGER. I don't know, sir.

The COURT. It is interesting.

Mr. RENNINGER. The article goes on to state: "Basically,

10240 most paper is the same. It has no special protective characteristics unless and until it is given additional treatment," such as lamination, coating, waxing, impregnating, chemically treated and so forth.

On page 5 of this exhibit, under the heading "Glassine and greaseproof, they alone are different," the statement is made:

"Of the thousands of grades made by 774 mills there are a handful of mills making papers that are definitely and inherently different. Why? Because they are greaseproof." The bottom of the same page the statement is made:

"The food industries rely heavily upon glassine and greaseproof because of their totally unique character and because they strike the nicest balance between performance and cost that the packaging world knows."

This exhibit also recognizes that the Glassine and Greaseproof Manufacturers' Association recognizes the distinctive features of cellophane as on page 3 of the exhibit this comment is made at the bottom of the page:

"Most packaging materials are available as is. If foil has what you need, you buy it. If cellophane is required—if your product must be seen—well then good, you buy it.

What are some of the characteristics of cellophane that are equal, if not superior, to the papers?

10241 Mr. GESELL. Are you leaving this exhibit?

Mr. RENNINGER. Yes.

Mr. GESELL. I would like to call your Honor's attention to page 7925 under the heading, "To reveal or not to reveal."

Mr. RENNINGER. The Government has never contended that transparency is the proper wrapping material for all articles. Obviously there are some articles that should be hidden rather than seen. I am speaking of products, your Honor.

Mr. GESELL. Then, if your Honor will turn to page 7927 you will see uses on three pages all down the line which show clearly what we have been contending for throughout this case.

Mr. MINICUS. What is that, Mr. Gesell?

Mr. RENNINGER. What are some of the characteristics of cellophane that are equal, if not superior to the papers? What do the du Pont annual and semi-annual and quarterly competitive reports already in evidence have to say on this subject?

As pointed out previously, du Pont's annual and semi-annual competitive reports prior to 1948, when this case was brought, have very little to say on the subject. Since this is the case, can du Pont actually have felt that cellophane was in competition

10242 with the papers? These reports are replete with references to competition of all kinds from Sylvania or Celon, but there are only two mentions made of glassine or waxed paper in these reports prior to 1948.

In Government Exhibit 438, the semi-annual competitive report, July–December, 1931, there is a reference to allied wrapping materials such as glassine. The report states that due to the depression, Riegelite, because of its lower cost, had found some acceptance in the baking industry, but at soon as business in the baking industry righted itself the business would be regained due to the insufficient protection offered by the glassine papers.

Government Exhibit 439, semi-annual competitive report, January to June 1932, the same depression period, stated that the sentiment in the baking industry was that a mistake had been made in adopting these inferior wrapping materials, that is, glassine, as sales had declined and stale returns increased.

I am sure your Honor will remember the so-called evidence of the defendant, the salesman trade reports, twenty or so of them introduced around the depression period relative to the baking industry and the so-called competition with these other wrapping materials.

The depositions taken by the defendant are replete with
10243 references to the equal or better protection afforded by cellophane as contrasted to the other flexible wrapping materials. These depositions are in 52 also.

To give a few examples, Jakes, of the Curtiss Candy Company, on page 60 was asked:

"Question: When you have used cellophane as a wrapping material on a particular product, can you tell me why cellophane was selected for that product?

"Answer: Yes. It was felt that it properly displayed the product to the consumer; that probably it provided the required protection."

On page 61:

"Question: Have you had any experience, sir, with the wrapping of the Curtiss products that would lead you to believe that there is a quality in cellophane beyond the transparency that aids its effectiveness in merchandising?

"Answer: Yes.

"Question: What is that quality, sir?

"Answer: Protection, for one thing, which is important to a perishable food product."

And Torrence of the Aluminum Company of America, page 23 and 24 said: "Only foil that is moistureproof is foil of .0015 gauge and above. Foil of this gauge is only used in flexible packaging field to a limited extent."

He also stated that foils from range of .0015 to .0035 are subject to pinholes.

10244 I think, your Honor, we have an admission by the defendant that foil is opaque with the exception of pinholes.

Mr. GESELL. It depends how big the pinhole is.

Mr. RENNINGER. Mr. McCurry, on page 91 and 92 of his deposition was asked:

"Question: What are the principal qualities you look for in a wrap?"

"Answer: Keeping—now, which wrapper are you talking about? There are no keeping qualities in the sulphite wrapper that goes outside; the protection is on the inside.

"Question: Where protection is necessary.

"Answer: Where protection is necessary. With the cellophane you have protection with the fact that it is made moistureproof, and those things are developed in this way; in some varieties we have to use two 300's to get the proper protection, and on others that we do not need the same protection we use a single 300 because we have told du Pont, Sylvania, and Olin every time they come to us, 'What can you do to make a better sheet of cellophane?' We have them all of the time.

"Question: Then the quality is of protection alone?

"Answer: The quality of protection, that is what we are looking for. Of course, the transparency is necessary
10245 too, but I do not think they are going to lose that."

The COURT. Instead of "300" that should be "450."

Mr. GESELL. These matters are all summarized in the summaries.

Mr. RENNINGER. If your Honor please, we feel by reading the exact words by the witnesses you are able to understand and appreciate the actual words that were spoken at the time the depositions were made rather than cold, incomplete or hidden summaries.

Mr. Horn, of General Foods, was asked whether he could compare the protective qualities of waxpaper, glassine, sulphite and so forth as compared with cellophane. He answered:

"That is a rather broad question. Generally speaking, the protective qualities of cellophane, as opposed to all the other items you mentioned, consist of a higher resistance to the passage of moisture through the film, higher resistance to water, and to fats and oils."

He was asked as to the protective qualities of the various films, and he thought that they were approximately the same as cellophane.

But the deposition went on to say that the General Foods Corporation had tried to use pliofilm, polyethylene, cellulose
10246 acetate and Cry-O-Vac, but they found them unsatisfactory due to poor machine running qualities, stretching qualities and for other reasons. This also is still in 1952.

10247 The COURT. This is still McCurry?

Mr. RENNINGER. Horn, sir; 43 and 44.

Mr. GESELL. 74 and 75 of the print you will find it, your Honor.

The COURT. Proceed.

Mr. RENNINGER. And Mr. Goland, of the Printon Corporation, a converter, stated at page 79 of his deposition, and I quote:

"It is very interesting that cellophane will stand up for more abuse than glassine in spite of the fact that paper by itself is stronger than cellophane, but it will stand up more abuse than glassine."

In addition to possessing equal or superior protective characteristics, cellophane achieves its consumer preference with regard to the particular uses for which it is designed from its ability to render the products wrapped therein visible without distortion or haze. In this regard it is entirely distinct from all the fibrous wrapping materials. As we have seen, this factor of complete transparency of cellophane over the papers has been recognized as an important factor by the Glassine and Greaseproof Manufacturers Association, in Government Exhibit 6004, where it is

stated on page 3, "If cellophane is required—if your product must be seen—well and good, you buy it."

10248 And in all the depositions taken by the defendant, even those involving witnesses representing the manufacturers of glassine and greaseproof papers, each one points out the fact that wax paper and glassine are in no way transparent like cellophane.

Mr. Nelson, of the Rhinelander Paper Company, discussing the visibility of glassine, stated that it is,——

Mr. GESELL. What page? You will have to give us some reference. And I do think, your Honor, this is transgressing the order of this morning, reading these questions and answers when it is all here in the summaries, and they are the things that are in evidence.

Mr. RENNINGER. If your Honor please, I would like to take up the summary of Mr. Ramsay on page 85 and 86.

"Question: I mean, aren't the characteristics of cellophane quite different than wax paper as a whole?

"Answer: Yes.

"Question: Where the difference in different types of wax paper or only minor differences or degrees?

"Answer: Not as broad but substantially different. I will explain my point. We have certain grades of wax paper which are semi-transparent and at the same time with high gloss such as double wax paper and waxed glassine. Yet we have other grades of paper, very heavy weight, called 75 pound base * * *" and so forth.

10249 The defendant's summary of this exhibit, on page 244, at the top, discussing this particular statement that I just read, says, "Nashua has grades of waxed paper that are transparent and have gloss, such as double waxed paper and waxed glassine." The exact wording of the deposition says "semi-transparent". That clearly, your Honor, is a misstatement.

Mr. Nelson, of the Rhinelander Paper Company, at page 62 of his deposition, said that as to their highest grade of glassines, which represents from five to fifteen per cent of the Company's sales, if you take cellophane as being 100 per cent transparent, why this most highly transparent type of glassine would be closely pushing 70 per cent.

Again, page 9 of Mr. Nelson's deposition, he states that when Rhinelander speaks of transparency, it is not speaking of glass clear transparency and "When pinned down, we say "translucency'."

All the converters the same way—Mr. Goland of the Printon Corporation, Mr. Hanson of Milprint, in all of their depositions relative to transparency, say that none of the papers can compare.

Mr. Leinbach, who testified on the stand, page 6787 of the transcript, also stated that his glassine was not near as transparent as cellophane.

10250 It is admitted, of course, that all of the films, on the other hand, have a high degree of transparency, much higher than glassine, although most of them do not have the transparency or luster of cellophane. Nevertheless, these films are lacking in other important characteristics that cellophane have and, of course, sell at a much higher price.

As an example, Government Exhibit 6032 states that polyethylene does not have the transparency or sparkle of cellophane and also is poor in machine running qualities.

Mr. R. R. Smith, when he was on the stand, wasn't sure whether du Pont is still advertising the transparency of its cellophane in its advertisements. I just happened to notice, of all places, in the Ladies Home Journal an advertisement of du Pont cellophane in which a visible presentation is made there and stress is made all through the article as to the transparency of cellophane.

Mr. GESELL. Well, you are in error about Mr. Smith's testimony, Mr. Renninger. He said he had sold, that he always would sell and always did sell on the basis of transparency. The question that was addressed to him was whether a particular slogan was or was not still used in the advertising relating to transparency, and he constantly emphasized that he was selling transparency.

Mr. RENNINGER. As to the slogan, the slogan is also at the

10251 bottom of this advertisement, "Cellophane shows what it protects, protects what it shows."

Mr. GESELL. That wasn't the slogan he was asked about.

Mr. RENNINGER. I am not sure.

Mr. GESELL. It was, true and complete transparency.

The COURT. Let me see the ad.

(Paper handed to Court.)

Mr. RENNINGER. Previously I mentioned that there are actually four packaging markets, one, the general packaging materials market, both rigid and flexible; two, the flexible packaging materials market, from which the defendant has extracted 11 products which it states are in competition with cellophane; three, the transparent film market in which cellophane is included because of certain of its characteristics; and four, the cellophane market.

It is interesting to note that practically all of the du Pont documents, when they speak of any market other than the cellophane market, speak only of the transparent film market, and most of them point out that the films are principally specialty wrappers and competitive only in fringe uses. And, as Mr. Gesell stated at page 4916 of the transcript, the transparent films account for only

about two percent of the flexible packaging materials used in the Heller study.

10252 Government Exhibit Number 9, already in evidence, states, "The transparent wrapping materials discussed are continuous colloidal films and are thus distinct from paper which has been treated to render it semi-transparent." Government Exhibit 9 is a pamphlet issued by the United States Department of Commerce and describes the physical characteristics of various transparent wrapping materials, such as cellophane, cellulose acetate and rubber hydrochloride film. And on page 6 of the exhibit the statement is made that cellulose acetate differs from regenerated cellulose in that it is thermoplastic, that is, it softens when heated and regains its normal conditions upon cooling.

Around 1940 du Pont began to show an interest in some of the newer films. Government Exhibits 6006 and 6007 describe a Development Section report on the newer films and what du Pont felt was the future for these films. As Ernest Benger stated to Mr. Hatt in 6006, I quote:

"We think, however, that some of these materials may be capable of attaining sufficient sales volume to be interesting as supplementary films."

The document also states:

"It should be recognized in the first place that we know of no non-viscose film, except methyl cellulose, which is competitive with Cellophane in cost."

10253 Government Exhibit 6007, which is an excerpt from the Development Section report on new films, dated March 1, 1940, discusses the potential market for ethyl cellulose, rubber hydrochloride, polythene, nylon, and others. And on page 1 of the report the following statement is made:

"It should help crystallize opinion as to which new films, if any, are worthwhile supplements to 'Cellophane', to show a reasonably complete picture of the present status of each of the more promising film formers. This permits comparison of any one new film with the others. Such comparisons in the past have suffered, we believe, by the absence of fairly accurate cost and investment estimates as well as by the lack of a complete picture of the requirements and extent of the markets which exist outside the field being served by 'Cellophane'.

The report then goes on to discuss certain characteristics of these films which might possibly "round out the cellophane line profitably".

Government Exhibit 6008 is a memorandum covering a meeting on possible new films for the Cellophane Division, and page 2 of the memorandum speaks of a field of thin films. No mention is

made in this report as to any competition with any of the papers. The exhibit describes a patent position of Dow on saran film and the possibility of getting together with Dow to exchange
10254 patent rights. And page 5 of this report states under "Survey Program":

"Mr. Hatt feels there is much information in the Cellophane Division which will be of considerable assistance in analyzing the relative merits of new films. Furthermore, he believes a broad survey of uses would not necessarily be required since among the 100,000,000 pound consumption of cellophane, there are substantial outlets where cellophane is not entirely satisfactory and where the new film might meet the need. Mr. Yerkes stated he does not feel the new film need necessarily be of the all-purpose type so long as it assists du Pont in maintaining its leadership and contributes materially to the business of the Department."

Government Exhibit 6009, dated June 25, 1945, is described as an analysis of competitive activities in the non-cellulosic film field. On page 1 of this exhibit there is a statement, "From a competitive viewpoint these films do not appear likely——"

Mr. GESELL. It says "these new films", doesn't it?

Mr. RENNINGER. "* * * these new films do not appear likely to capture important markets where cellophane is now clearly established."

The report then goes on to state that these new films, how-
10255 ever, are opening new types of film markets for which cellophane is deficient in certain required products. The report points out that all the new films are made from synthetic polymers, and the various deficiencies of polyethylene, saran and pliofilm are discussed. It is interesting to note that at this time the plastic department of du Pont is making polythene film by heat extrusion method.

10256 Government Exhibit 425 already in evidence, entitled "The Clinton Project," discusses on page 6 what is called the competitive situation. This report states that they have but one competitor making the same type of product and that the other films are of minor importance and are in reality only specialties. In discussing the competitive situation no reference is made again to glassine or wax paper.

Quoting from page 6 of this exhibit 425:

"There are miscellaneous types of films o fseveral kinds being discussed and talked about, some of which are being offered in a small way at present by other concerns who see a possible opportunity to divide part of this wrapping tissue field with us."

Here we have the terminology "wrapping tissue field."

The COURT. Five-minute recess.

(At this point a brief recess was taken.)

Mr. RENNINGER. Continuing reading from Government Exhibit 425, on page 6 of that exhibit:

"For the past few years we have worked with our Technical and Chemical groups discussing the possibility of production of other types of material and as a result of this we are not putting in a small unit for the manufacture of cellulose acetate film
10257 at Richmond. This will give use a type of equipment also which will make it possible to make certain specialized types of films cast from solutions such as the vinyl acetal resins, ethyl cellulose, cellulose acetates of different types, and perhaps rubber hydrochloride. In our judgment these films will occupy a certain field largely of specialized purposes, and I believe we are fully conscious of their potential and hope that within the next year or two to be able to produce such specialties where required.

"Our central Chemical Department tell us in our discussions with them repeatedly on lower priced films or films of a different type at similiar prices, that might be developed competitively, that they can recommend at this time nothing that offers more profitable possibilities than cellulose materials. They point to the fact that we start with a low priced, easy available type of product in celulose and that most anything else against that can be offered only at a price disadvantage which would probably not lend itself to widespread adoption for every day use on many low priced articles of general consumption. They have considered starch at quite some length and find it of very meager possibilities so for as tough films are concerned. It has practically no tensile strength and has not been commercially made as yet. Continued study and development will be necessary along a number of these lines of different types of film for special purposes, if
10258 obliged to do so we can make our price position on cellulose film still more attractive and still calculate a satisfactory profit largely because of our present position in volume and the quality of the film we now produce."

Government Exhibit 6010 is an article taken from Modern Packaging Encyclopedia entitled "Plastic Packaging Films". This, your Honor, is found on page 7955 of the bound volume. This article is written by Charles A. Southwick, Jr., a defense witness by deposition in this case. Mr. Southwick was asked about various statements of his as contained in this article, and he testified that he felt that the statements were true. You will note that in the middle of the first paragraph of the firs page of the article:

"The point of saturation for cellophane is still far ahead of us and within the year a new source of supply will be in production.

The properties of each of the films are bing studied more carefully, and, as a result, more intelligent applications are being made.

"It is rather difficult to classify this group briefly since properly there falls within this group materials with extreme differences in composition, properties, appearances, etc. For example, the word 'transparent' does not necessarily apply because some of these films are rather cloudy although, in general, they
10259 all possess considerable clarity. Also the word 'flexible' does not properly describe this class of materials since in some cases the materials show considerable rigidity even in thin films.

"Obviously, it is not possible to classify this large number of materials by end use since they cover a range of uses from completely decorative to industrial uses where their appearance is not a consideration. The use of the word 'plastic' or 'thermoplastic' is not strictly correct because cellulosic films must be included in this group and their base material does not properly come under these terms.

"However, the use of the word 'plastic' appears to be the best compromise because of its generally accepted connotation and the fact that the predominance of these films in number is covered by this word."

At page 7956 under "Regenerated Cellulose Films" we have this statement, the first paragraph:

"The cellophanes, while not strictly plastic based materials, exhibit many of the properties of plastic films since their coatings are in this category and the coatings determine many of the properties of the final structure. These comprise the bulk of the transparent films in production today. They are transparent colorless, slow burning and affected by changes of the humidity in the atmosphere. The fact that the base is hygroscopic or water-wettable makes it possible to use the films for products having high
10260 fat content. It also results in a film which must be coated to make it moistureproof, as well as heat sealable."

Under "Cellulose Acetate" on the same page we have this statement:

"Because of its good dimentional stability, clarity and general durability, cellulose acetate, laminated to paper or to foil finds wide use for highly decorative and protective packages, labels, booklet covers, etc. Cellulose acetate in the thicker gauges is a very important material used in the construction of rigid transparent containers."

The last paragraph in the second column:

"Cellulose acetate films differ radically from regenerated cellulose because the acetate base is water-insensitive and can only be

put in solution by certain solvents. Its manufacture is more involved, and so it is higher in cost than regenerated cellulose."

Under "Ruber Hydrochloride Film" at page 7957 the statement is made, first paragraph:

"In several important ways, rubber hydrochloride film differs materially from the films previously described. First, its base is rubber and not cellulose; it is inherently moistureproof and capable of welded-type heat seals."

Skipping two paragraphs:

"Since this film has the property of making strong welded
10261 seals, it offers possibilities for the packaging of certain liquids which could not be packaged successfully in any other film. Its high strength values, durability and strong seals make it preferable for large size bags for heavy products.

"Rubber hydrochloride film can be printed, laminated to itself or to paper or other bases to improve physical or operating characteristics. Rubber hydrochloride films are higher in price per pound than regenerated cellulose, but frequently by use of light gauges with a high yield in square inches per pound this inequality disappears. In general, there is little competition because of extreme differences in properties and end uses."

Various other films are discussed in this article, most of which have not been made a part of this case.

Mr. GESELL. I think I should advise the Court before we leave this exhibit that at page 31 of the deposition summary for Mr. Southwick it states: "Generally speaking, Mr. Southwick had no experience or qualification in merchandising aspects of packaging, and consequently has always approached flexible packaging materials from an engineer's point of view. Also Mr. Southwick could think of no definable area of use that would require exactly the properties of cellophane and could not be solved by any other material."

Mr. RENNINGER. He is a packaging engineer, your Honor.
10262 That was his job, to try to find as many possible materials for many possible different products.

Government Exhibit 6011, a duPont document entitled "Market Potential for Transparent Sheeting as of January, 1950" describes the manner in which duPont arrived at this potential. Page 7963, reading from the first paragraph:

"A study to determine the market potential for transparent sheeting has just been completed. This potential represents the approximate volume of transparent sheeting which could be sold if logical applications were made to the current national production of packageable goods in the industries in which a thin flexible wrapping material can be applied. In total, we calculated this potential to be 626,000,000 pounds for the domestic market."

Page 4 of that document shows that duPont believes that cellophane has great functional and commercial uses in the sweet dough field, more so than any other field.

Mr. GESELL. What page is that, Mr. Renninger? I can't find it.

Mr. RENNINGER. Page 7972 at the bottom of the page.

Mr. GESELL. Thank you.

Mr. RENNINGER. Government Exhibit 6012, which is impounded document No. 40, is entitled "Thin Films Literature Research," and is dated May 18, 1949. An interesting comment is made
10263 on page 1 of this report as to the type and importance of the various articles appearing in packaging journals on the new films. The document discusses the various non-cellulosic films such as polyethylene, vinyl films, pliofilm, Saran and others. The quotation on page one, fourth paragraph, is as follows:

"With the important exception of cellophane, the volume of recent journal articles for any given film was noted to be proportional to the importance and acceptance of that film. Thus the majority of articles were concerned with the widely accepted polythene and vinyl films, whereas, the less important ethyl cellulose, cellulose acetate, and cellulose acetate butyrate films received but little attention. The dearth of cellophane articles is easily explained in that its role is so well established and its uses are so well known that little of interest remains to be reported. Films other than polythene and the vinyls that show extensive journal literature are the very recent films as S-polymer films or the one used for the oleomargarine bag, visten. Inevitably as each new film makes its commercial debut, a burst of articles about it appear in the packaging journals invariably inspired by the company offering them for sale."

I am pointing that out in reference to the various articles that have been introduced by the defendant praising to the sky the various films and various other packaging materials by the defendant.

10264 Government Exhibit 6013, which is impounded document 45, is an article on Polythene film dated January 4, 1950. This article states that duPont has been carrying on experimental work on polythene film for a number of years, and the report sets out various characteristics of polythene. The article points out that machine wrapping still presents a great problem with this film.

Page 4 of this exhibit, which is a quotation from a letter to A. E. Buchanan and E. B. Benger by W. G. Hunter and R. M. Horsey, dated October 31, 1946, the findings are summarized:

"The work done with Polythene film during the past two years has shown us that Polythene possesses a combination of properties—both chemical and physical—which together make for

uniqueness in the field of self-sustaining films. These unique properties of Polythene, on one hand, open fields that Cellophane cannot handle while, on the other hand, certain of these properties present definite problems in using Polythene in may applications, wherein Cellophane is doing a good job. Polythene, therefore, should be useful in diversification of the business of the Cellophane Division because many of the indicated uses and applications are new rather than replacements. Furthermore, it should and can be a profitable film. It need not sell at an extremely low price to command a sizable market."

10265 Mr. GESELL. Just a minute. It goes on to say:

"The potential volume for this film is sufficiently large to warrant du Pont's entrance into the field in the face of established competition. Polythene is a du Pont product, its overall properties in film form are attractive and, as such, it is the only available film with which we might check the inroads of Pliofilm competition into our moistureproof Cellophane business for some time to come."

Mr. RENNINGER. You can say later as to the importance of the pliofilm competition.

Mr. GESELL. You can't prove your case by cutting sentences in half.

Mr. RENNINGER. I didn't cut a sentence in half.

Government Exhibit 6001 is a document authenticated by Mr. R. R. Smith. Mr. Smith described this document as an outline prepared for a presentation which the Film Department was preparing to make to the Executive Committee of the duPont Company outlining what they thought would be a tentative position of their products over the next eight to ten years. This is found in transcript page 5912.

This document was prepared by Mr. Smith. The "Purpose of Presentation", it is stated, is:

"A. To show the all-over potential market for films based on our concept of logical applications—whereby non-overlap-

10266 ping markets exist for different films based on functional differences and price. To show the potential markets for Du Pont films on this basis."

That is found on page 8037.

"B. To show du Pont's present position in the film industry and large unsold potential.

"C. To demonstrate the penetration of specific markets to date and the functional differences in films required to effect this penetration.

"D. To forecast Du Pont's 1955 film position with particular reference to opportunities for Polythene and V film in markets not considered Cellophane potential or Cellophane competition."

this document in which he fills out the story and shows precisely what happened with respect to it.

(The letter from Milprint, Inc. to Mr. E. C. Lake dated April 18, 1946, was received in evidence and marked "Government Exhibit No. 5584.")

Mr. ROACHE. The Government introduces into evidence Government Exhibit 5585 at page 7893, formerly identified as Plaintiff's Hanson No. 17.

Mr. GESELL. We have an objection to that, your Honor, on the grounds of authenticity and hearsay.

Mr. ROACHE. I withdraw the document, your Honor.

The Government introduces into evidence Government Exhibit 5586 at page 7895, formerly identified as Plaintiff's Hanson No. 16. This is a letter from E. C. Lake to Milprint dated April 3, 1946, attention Mr. Hanson, Vice-President, and it reads:

"Answering your letter dated April 18ty, I recognize the matter of principle involved in your referring orders for small quantities to the H. D. Catty Corporation and also to Brooks. However, they are becoming less interested in their agency business, at least that part of it having to do with 500-lb. roll stock, and have been devoting their time to the development of converted prod-
10194 ucts of Cellophane which—in my opinion—do not conflict with the broader aspects of conversion, such as you or the other large converters are interested in.

"Catty's interest in the resale of Cellophane in unconverted forms will be in handling cut-to-size sheet business, as well as small roll stock users buying in less than 500 lbs.

"While it may be objectionabl to you to refer prospects to them, I really feel as though, in doing so, you would not be feathering the nest of some prospective competitor.

"If you wish to hold this matter in abeyance until I see you, I shall be very pleased to discuss the matter with you in more detail."

Mr. GESELL. I simply want to point out, your Honor, that 5586 is duPont's reply to 5584 and is comprehended in the discussion that appears at page 268 of the summary and 269.

(The letter from E. C. Lake to Milprint dated April 3, 1946, was received in evidence and marked "Government Exhibit No. 5586.")

Mr. ROACHE. The Government introduces into evidence Government Exhibit 5588 at page 7897, formerly identified as Plaintiff's Hanson No. 19.

Mr. GESELL. Are you going to skip '87?

Mr. ROACHE. It is taken in another order.

10195 Mr. GESELL. I have an objection to 5588, your Honor, on the grounds of authenticity and hearsay.

Mr. ROACHE. In the deposition, your Honor at page 188 of the Hanson deposition, it says:

"Question: I show you photostatic copy of one of your company's letters selected by the F. B. I., written by Shy Rosen to Roy Hanson, dated 5/7/46. Is that a photostatic copy of one of your company's letters?

"Answer: I would say so, yes.

"Question: Is it a true copy of a letter sent by Shy Rosen to Mr. Roy Hanson?

"Answer: I would say it is."

Now, the man giving this testimony, your Honor, was Mr. Hanson to whom the letter was addressed.

Mr. GESELL. In addition to the point I already called your Honor's attention to which is applicable to this exhibit at page 210, here is what the testimony shows at 242:

"Question: Here is Plaintiff's Hanson Exhibit 19 for identification. This concerns a conversation between Shy Rosen and Ed Lake, in the second paragraph. Do you know that this conversation took place?

"Answer: No, I do not, only that he says it did."

So on both authenticity and hearsay we object.

Mr. ROACHE. This letter was written to Hanson and he identified it as having received the letter from Shy

10196 Rosen.

The COURT. Objection overruled. Go to the next exhibit.

(The letter from Shy Rosen to Roy Hanson dated May 7, 1946 was received in evidence and marked "Government Exhibit No. 5588.")

Mr. ROACHE. This is a Milprint inter-company memorandum from Shy Rosen to Roy Hanson dated 5/7/46. It reads:

"Lester Zimmerman raised the question as to our cooperation with H. B. Catty inasmuch as they are competitors.

"You will recall on my visit with Ed Lake in Wilmington he thought we could work our problem out and still retain our relationship.

"I spoke to Mr. Dillman of H. D. Catty on the telephone. We made an appointment to get together sometime next week in New York. After our discussion we will advise you further."

Mr. GESELL. On that, your Honor, I merely want to comment Mr. Rosen and the other gentleman mentioned have no connection with duPont, and the only witness called with respect to this document, which is not in duPont's files, stated that he had no knowledge that the conversation took place.

Mr. ROACHE. The Government introduces into evidence Government Exhibit 5589 at page 7898, formerly identified as Plaintiff's Hanson No. 20.

10197 Mr. GESELL. We have an objection to that, your Honor.

The witness was categorically asked whether he knew, at page 243, that these matters discussed in this document—knew anything about it, and he said:

"Question: Do you know that that is what their representative said?

"Answer: No, I don't."

That is at page 243 of the transcript.

It again is hearsay and not authentic.

Mr. ROACHE. At page 188 of the deposition:

"Question: I show you photostatic copy of one of your company's letters selected by the F. B. I., written by "Zimmie", addressed to Billy Heller, copies of Roy Hanson, Bert Hefter, and Shy Rosen, dated May 23, 1946. Is that a photostatic copy of one of your company's letters?

"Answer: I think so, yes.

"Question: Can you identify the "Zimmie"?

"Answer: L. R. Zimmerman.

"Question: Is this a true copy of a letter written by L. R. Zimmerman to Billy Heller?

"Answer: I think so.

"Question: Did you receive a copy?

"Answer: I think so."

Mr. GESELL. But that overlooks the fact that this is two

10198 people talking, neither of whom were on the deposition, and the man who was on the deposition knew nothing about the conversations that took place between them, and none of them had anything to do with duPont. It is hearsay.

The COURT. Objection sustained.

Mr. ROACHE. The Government introduces into evidence Government Exhibit 5590 at page 7898, formerly identified as Plaintiff's Hanson No. 21. This is a letter from William Heller, Vice-President of Milprint, to Mr. E. C. Lake of duPont, dated February 26, 1947, with copies to Roy Hanson, Bert Hefter, and Lester Zimmerman. It reads:

"Please notice the attached memo from Zimmie of our Chicago office, regarding H. D. Catty and Company."

That was the letter that was just objected to.

Mr. GESELL. No, it was not, Mr. Roache.

Mr. ROACHE. The previous one.

Mr. GESELL. No, it was not, Mr. Roache. I beg your pardon. There is a year's difference between the two documents. You have overlooked the dates.

Mr. ROACHE. I am sorry, your Honor.

"For your information, we cannot give any plain Cellophane to any of our customers.

"Can't you put us in position—can't we be a jobber of Cellophane, the same as H. D. Catty Company, or the same as Brooks Paper Company?

"Why, my dear Ed, should we be orphans or step-
10199 children?

"May I hear from you regarding the above?"

Mr. GESELL. I think I might point out, your Honor, that here comes a document from one of the favored converters written in 1947 accusing duPont that it is being treated like an orphan and step-child.

Mr. ROACHE. In this deposition of Mr. Hanson, your Honor, on pages 92 and 93 Mr. Hanson states that they were converters of cellophane, just converters. This is in 1952. So at this date they still were not able to job cellophane.

Mr. GESELL. Isn't this dated 1947?

Mr ROACHE. I am talking about the deposition which is dated February 13, 1952

(The letter from William Heller to Mr. E. C. Lake dated February 26, 1947, was received in evidence and marked "Government Exhibit No. 5590.")

Mr. ROACHE. Now, next, your Honor we have a group of five documents which will be addressed to the wrapping of white bread. These exhibits will show how duPont restrained the sale of cellophane for use as a wrapper on white bread. It also rebuts Mr. R. R. Smith's testimony relative to white bread. Your Honor will recall Mr. Smiths disseitation on duPont in the baking industry. As to white bread reference is made to pages 5674 and
5702 wherein in 28 pages of transcript Mr. Smith tells of
10200 the difficulties encountered in selling cellophane for white bread and how strenously duPont tried to sell cellophane to wrap white bread.

The Government introduces into evidence Government Exhibit 5591 at page 7900, formerly identified as Plaintiff's Hanson No. 7. It is a Milprint letter from Jim Hopkins to Earl Hardman of Milprint dated October 3, 1945. Under the date is the subject: Fisher Brothers Company Victory Loaf.

Mr. GESELL. With respect to that, your Honor, our objections are hearsay objections and authenticity objections. As far as hearsay is concerned, that is our principal ground. Here is a document again like the one just previously between two people, neither of whom are connected with duPont, and the witness was neither of those two people.

In addition, when the witness was called to testify he said this document was false.

So I say that is hearsay, and in addition, on 210 he said he could not authenticate it as coming from his company.

Mr. ROACHE. This was authenticated in the same manner that the others were, your Honor; but there is an additional point here, I believe. This is in a series of documents referring to this incident at which there will be three documents introduced from Milprint, and then we will get two answers on this subject matter,

10201 one from Roy Steel of duPont and one from E. C. Lake, both addressed to the Milprint organization, all relative to this same subject matter. I feel, your Honor, this is one of a group of documents in a series pertaining to the wrapping of white bread.

Mr. GESELL. You don't contend, do you, Mr. Roache, that 5591, for example, was shown to duPont at any time?

Mr. ROACHE. I didn't say that. It was written by Milprint, and these last two documents in this group of five will be written by duPont officials to Milprint relative to this subject matter.

The COURT. If it has inherent infirmities as a piece of documentary proof I don't see how it can get validity simply by joining a group, like a chain reaction. The objection is sustained.

Mr. ROACHE. The Government introduces into evidence Government Exhibit 5592 at page 7901, a letter from William Heller, Vice-President of Milprint, to E. C. Lake of duPont dated October 11, 1945.

In this letter Mr. Heller states that Mr. Lake wanted him to advise Lake whenever anybody was using cellophane on white bread. Then he, Mr. Heller, advises and complains that some duPont salesmen in the northwest area had been advocating such use for cellophane, and states that had this man been complying with the agreement reached in Lake's office in Wilmington this would never have happened.

10202 Mr. GESELL. I call your Honor's attention to page 160 of the deposition and to page 265 of the summary that bear on this subject. He said:

"Question: After reading these letters, Mr. Hanson, do you agree that duPont had agreed with Milprint that it would stop its salesman from selling cellophane for white bread?

"Answer: Actually, we did not. We sold cellophane for white bread. I recall now that duPont did advise against the danger of not being able to keep the white bread industry supplied with material.

"Question: And you do say that you did do it?

"Answer: What?

"Question: Your company did sell it for wrapping white bread?

"Answer: Yes, that is correct.

"Question: Did you report other people for doing the same thing?

"Answer: Did we report other people?

"Question: Yes.

"Answer: Not that I am aware of. We might have."

10203 Mr. ROACHE. The Government introduces into evidence Government Exhibit No. 5593 at page 7902, a Milprint letter from Roy E. Hanson, Vice President of Milprint, to E. C. Lake of du Pont, dated October 15, 1945.

(Letter from Roy E. Hanson to E. C. Lake, dated October 15, 1945, was received in evidence and marked "Government Exhibit No. 5593".)

Mr. ROACHE. Mr. Hanson starts off by asking that the information he is about to give be treated with confidence and not to involve Milprint in any way. Now I read at the second paragraph:

"The fact is, however, that the W. E. Long Company of Chicago are promoting the use of Cellophane for white bread. As a matter of fact, Mr. Long himself is pushing this thing pretty hard. I think that someone from your organization should see Long and set him straight. It goes without saying that we have no quarrel with anybody for trying to promote the use of Cellophane in the bread industry, but I believe it is your intention to try to curb such promotion until such time when you can handle the demand."

Now, the Government introduces into evidence Government Exhibit 5594 at page 7903, the du Pont letter from Roy Steele,

Sales Manager, Cellophane Division, to Roy E. Hanson,

10204 of Milprint, dated October 25, 1945, and it is in answer to Mr. Hanson's letter to Mr. Lake.

(Letter from Roy Steele, Sales Manager, Cellophane Division, du Pont, to Roy E. Hanson of Milprint, dated October 25, 1945, was received in evidence and marked "Government Exhibit No. 5594".)

Mr. ROACHE. Mr. Steele says:

"Ed Lake has shown me your letter of October 15th concerning the efforts of the W. E. Long Company on Cellophane for white bread.

"It so happened that I saw Mr. Long in Chicago at the recent Bakers Association Governors meeting and I have posted him on the latest status of our supply position so that he would know that we are in no position to take on any substantial extra orders that a switch to Cellophane on white bread would involve.

"I am certain, therefore, that there will not be any premature recommendation in this direction, although I believe Mr. Long fundamentally feels that a high grade loaf of white bread deserves a maximum appeal in the store and will get it through Cellophane."

Mr. GESELL. Your Honor, at page 265 of the summary of the

depositions, W. Long is identified as a bakery sales organization. I want to call attention to the date of these letters, 1945.

Mr. ROACHE. The Government introduces in evidence
10205 Government Exhibit No. 5595 at page 7904. It is a du-
Pont letter from E. C. Lake to William Heller, Vice President of Milprint, dated November 27, 1945.

(Letter from E. C. Lake to William Heller, dated November 27, 1945 was received in evidence and marked "Government Exhibit No. 5595".)

Mr. ROACHE. Mr. Lake is answering Mr. Heller's letter of November 19 and states he has discussed the matter with Mr. Steele and as Milprint probably knows, the large baker buys the cellophane in one territory and uses it in another for whatever use he desires. Du Pont cannot do anything about it except its continual attempt to ward off the use of such cellophane on the ordinary white loaf until such time as the supply conditions are more favorable.

Mr. GESELL. That was not reading from the letter, your Honor. I will read it:

"Proper precautionary measures have been taken in our discussions with the various association officials, etc. against the use of Cellophane on the ordinary white loaf until such time as the supply situation on Cellophane justifies an expansion in that direction.

"It goes without saying that it is beyond our prerogative to dictate to the baker, whether large or small in what territories he shall use his Cellophane and specifically for what products. It is up to him to decide which.

10206 "Under such limitations it has not been possible to conduct an extensive selling campaign covering all potential markets. It has been impractical to conduct extensive sales campaigns in such fields as white bread, meat and fresh produce because only limited amounts could be allocated to these uses, amounts far below the potential requirements, if the campaign were successful."

Then on page 4, the first complete sentence at the top of the page, and I quote:

"It is believed that a large potential for increased consumption exists in the white bread field, especially with the independent bakers. Sales in this field have never been pushed because sufficient material to supply the market has never been in sight."

Now, the next group of three documents are probative of the fact that du Pont restricted the resale of cellophane for the use on milk bottles to two companies.

The Government introduces into evidence Government Exhibit 5596 at page 7905, a letter from M. C. Strickland, Vice President

of Smith-Lee Co., Inc., Oneida, New York, to E. I. du Pont de Nemours & Company, dated April 17, 1946, attention, Mr. Lake.

(Letter from M. C. Strickland, Smith-Lee Co., Inc., to E. I. du Pont de Nemours & Co., dated April 16, 1946 was re-
10207 ceived in evidence and marked "Government Exhibit No. 5596".)

Mr. ROACHE. It states:

"Enclosed find copy of a letter received from our representative in the Boston area, Mr. L. G. Curtis. This is in reference to Mr. S. S. Woodward of the H. D. Catty Corporation.

"I suppose this salesman is out trying to sell regular Cellophane for use on milk bottles. Knowing that it will not stand up like the dairy moistureproof Cellophane, I am just afraid if dairies use it that we're going to run into further trouble."

Then the attached letter that he makes reference to states:

"I thought that we had exclusive distribution for the dairy industry for du Pont." By Lew Curtis.

The Government introduces into evidence Government Exhibit 5597 at page 7907. It is a letter from E. C. Lake, du Pont, to M. C. Strickland, Vice President, Smith-Lee Company, dated April 24, 1946.

(Letter from E. C. Lake to M. C. Strickland, dated April 24, 1946, was received in evidence and marked "Government Exhibit No. 5597".)

Mr. ROACHE. It reads:

"Acknowledging your letter of April 17th, I am taking the
10208 matter of the H. D. Catty Corporation's solicitation of the dairy industry up with them. I expect that corrective measures will be taken so that the waters will not be muddied up from here on in."

The Government introduces into evidence Government Exhibit 5598, at page 7908. It is a letter from E. C. Lake, du Pont, to Mr. P. A. Dillman, Assistant General Sales Manager, H. D. Catty Corporation, of New York, dated April 24, 1946.

(Letter from E. C. Lake to P. A. Dillman, dated April 24, 1946, was received in evidence and marked "Government Exhibit No. 5598.")

Mr. ROACHE. It reads:

"I have received advice from the Smith-Lee Company, Inc., Oneida, New York, that their Mr. S. S. Woodward of the H. D. Catty Corporation, Boston, is soliciting the dairy industry on Cellophane.

"For your information, we consummated a deal with the Smith-Lee Company, Inc., Oneida, New York, also the National Manufacturing Company of Kansas City, Missouri, several years ago for the sale of Cellophane along with their Package Machinery

Company's hooding machine, bottle caps and tape, in other words a complete unit sale deal. Their sale of Cellophane is in roll form along with the caps they make and the tape which is made by Dennison Manufacturing Company.

10209 "The use of Cellophane in the hooding of milk bottles is loaded with complications—this is one of the reasons why we chose these two companies to solicit this field rather than ourselves. I do not believe it is a good business for you to solicit, considering all factors involved and I am, therefore, acquainting you with Mr. Woodward's activities so that you may take whatever action you deem advisable."

The COURT. We will take a ten-minute recess.

(At this point a brief recess was taken.)

Mr. GESELL. Your Honor, these three exhibits, Government Exhibit 5596 to 5598 relate to milk bottle hoods, which Defendant's Exhibit 409 shows amount to six-tenths of one percent of duPont's production.

DuPont developed a dairy moistureproof cellophane special film for this purpose, as you will see on page 7905, and here was a situation where another distributor was selling a type of cellophane unsuitable for this purpose, and the Smith-Lee company, which had the exclusive right of the packaging machinery hooding machines, complained that this was going to injure the business because Catty was selling an improper type of cellophane for milk bottles.

Mr. ROACHE. We come now, your Honor, to the last 10210 group consisting of six documents. These are further probative of duPont's control of the distribution and the outlets of its cellophane.

The Government introduces into evidence Government Exhibit 5600 at page 7910, which is a letter from Diaphane Bag Company to E. C. Lake of duPont dated November 10, 1943.

(Letter from Diaphane Bag Company to E. C. Lake dated November 10, 1943, was received in evidence and marked "Government Exhibit No. 5600.")

Mr. ROACHE. The Government also introduces into evidence Government Exhibit 5601 at page 7912, a letter from B. Y. Bandy of duPont to Ross W. Wishburne of Whiting-Patterson Company, dated October 23, 1943.

(Letter from B. Y. Bandy to Ross W. Wishburne dated October 23, 1943, was received in evidence and marked "Government Exhibit No. 5601.")

Mr. ROACHE. The Government offers in evidence Government Exhibit 5602 at page 7913, which is a letter from Ross W. Wishburne, Vice-President of Whiting-Patterson Company, Inc., to E. I. duPont de Nemours & Company, dated October 28, 1943.

(Letter from Ross W. Wishburne to E. I. duPont de Nemours & Company dated October 28, 1943, was received in evidence and marked "Government Exhibit No. 5602.")

Mr. ROACHE. Government Exhibit No. 5603 at page 10211 7914, a letter from B. Y. Bandy of duPont to Richard Dwyer of Print-A-Tube Company dated January 14, 1944.

(Letter from B. Y. Bandy to Richard Dwyer dated January 14, 1944, was received in evidence and marked "Government Exhibit No. 5603.")

Mr. ROACHE. Government Exhibit 5604 at page 7917 is a letter from E. B. Ichla of duPont to Milprint, Inc., dated September 1, 1947.

(Letter from E. B. Ichla to Milprint, Inc., dated September 1, 1947, was received in evidence and marked "Government Exhibit No. 5604.")

Mr. ROACHE. Government Exhibit 5605 at page 7918 is impounded document No. 67. It is a letter from B. Y. Bandy of duPont to B. N. Jackson of duPont dated April 26, 1950, and entitled "Customer-Sales Reporting."

(Letter from B. Y. Bandy to B. N. Jackson dated April 26, 1950, and entitled "Customer Sales Reporting" was received in evidence and marked "Government Exhibit No. 5605.")

Mr. ROACHE. These exhibits show that the converters of duPont cellophane at duPont's insistence reported monthly to duPont the names of the customers to whom they sold cellophane in converted form and the amount sold to each customer.

That is all, your Honor.

Mr. GESELL. This group, your Honor, of documents 10212 shows that duPont was assembling information as to the sale of duPont cellophane, not the sale of anybody else's cellophane, as was suggested. Secondly, they show that it was assembling information for reasons which are set forth and which to us appear wholly legitimate and proper reasons in 5601 at page 7912 of the exhibit.

There Mr. Bandy explains that this information is desirable in terms of giving salesmen credit for assistance on accounts and also is helpful in enabling duPont to tabulate data which will give a picture of its distribution and needed in its promotion and advertising work.

Incidentally, if there is any suggestion that the development of this information was improper in some way, I should call the Government's attention to the fact that L. 20 required the assembling of this information and the reporting of it to the Government over a good deal of this period.

I also would like to call your Honor's attention to page 261 of

the summaries of the deposition in which Milprint discusses the next to the last exhibit in this series, Exhibit No. 5694.

Mr. MINICUS. If your Honor please, we have come to the last section of our rebuttal. This is a lengthy section and its probably an important one. We are running considerably ahead of our schedule.

10213 I would like at this time to request a recess now for lunch and take up at two o'clock this afternoon in order that the final arrangement of our notes can be made.

There is no question that we will finish according to our planned scheduled by the close of the day next Tuesday. We could not possibly finish this section today under any circumstances, but starting this afternoon we will have plenty of time to finish before the end of Tuesday.

The COURT. Very well.

Mr. GESELL. While we are talking about schedule, could we come back Tuesday at ten-thirty instead of ten o'clock? We would appreciate it.

The COURT. All right. Recess until two o'clock.

(At this point a recess was taken until two o'clock p. m., the same day.)

10214 2:00 O'CLOCK, P. M., THE SAME DAY.

Present: As before noted.

The COURT. Proceed, Mr. Renninger.

Mr. RENNINGER. If your Honor please, it is the Government's contention that cellophane is a unique, distinct, separate product, and as such is in a market of its own. As such du Pont's competition is in reality only with Sylvania and, more recently, Olin.

The Government's complaint has alleged only that du Pont has monopolized the manufacture and sale of cellophane and not that it has monopolized a group of arbitrarily selected flexible packaging materials comprising only part of the flexible packaging industry.

As the Government has proven in its presentation of its case, we feel, du Pont has monopolized, has attempted to monopolize and has combined and conspired to monopolize the cellophane industry, which is any part of trade or commerce within the meaning of Section 2 of the Sherman Act.

The Government has shown that du Pont has a monopoly power and has controlled the cellophane industry and as such is in violation of Section of the Sherman Act.

10215 The basic question is not whether the defendant's conduct affects part or all of a whole field of commerce but rather whether it has brought about the particular harm which Congress sought to prevent in prohibiting monopolization. If the

availability of such alternate or substitute products were a defense, exclusion of competitors or power over prices with respect to anything less than the whole of a major line of commerce would be immunized from the Sherman Act.

The defendant maintains that numerous other materials compete in the market with cellophane.

The COURT. Would you repeat the sentence before that one.

Mr. RENNINGER. If the availability of such alternate or substitute products were a defense, exclusion of competitors or power over prices with respect to anything less than the whole of a major line of commerce would be immunized from the Sherman Act.

The defendant maintains that numerous other materials compete in the market with cellophane. To accomplish this purpose the market presented by the defendant as the one which must be monopolized by the defendant before it can be accused of violating Section 2 of the Sherman Act is the flexible wrapping materials market.

10216 In meeting this position the Government does not deny that cellophane, being primarily a wrapping material, can be found in all markets in which wrappers are bought and sold. It would seem that at least, to our point of view, there are four markets which co-exist in which this is the case, viz., the market for, 1, general packaging materials; 2, flexible packaging materials; 3, the transparent wrapping materials; and 4, cellophane.

In the general packaging material market there is included, of course, anything that is used for packaging any material, whether flexible or non-flexible. This market would also include tin cans, glass, board, cardboard containers of all types. This is a general packaging material market and cellophane can be said to be in this market in the sense that it is a wrapping material of a special type. But that does not mean that this market must be monopolized by du Pont in order to find a violation of Section 2 of the Sherman Act. And again cellophane can be also found in the flexible wrapping materials market. Anything that is a flexible wrapper can also be found in this market. In this flexible wrapping material market one can find such items as burlap, canvas, kraft, sulphate papers of all types and grades. However, the defendant realizes the absurdity of claim that cellophane is in competition with all flexible packaging materials and has arbitrarily selected a list of 14 products in this market that it contends are the principal items in competition with cellophane.

10217 The defendant, in its offer of proof, has arbitrarily eliminated kraft paper from the list of these articles as well as waxing papers under 18 pounds and vegetable parchment, glassine

and greaseproof papers over thirty pounds. Here again we see the defendants' untenable position.

It is very interesting to know that contrary to what the defendants' counsel now contends to be the market in competition with cellophane, the documents taken from the du Pont files show that the company itself does not actually consider cellophane to be in competition with these eleven materials.

Most of these documents of the defendant speak only of competition with Sylvania or Celon in caps and bands. However, a few of the documents, when considering a market concept, speak of a transparent flexible packaging material market, a third market. This market is limited to those transparent films as distinguished from fibrous paper products that one might say are in the transparent flexible materials market.

The factual basis existing in this case indicate that even the transparent flexible packaging material market is too broad a concept for a determination of whether a violation of Section 2 has occurred.

10218 However, the Government contends that cellophane is in a separate, distinct market of its own. We have seen, and the defendants' documents have brought out, cellophane is a unique, separate and distinct product. The documents already in evidence have shown that du Pont has and has been able to exercise almost complete monopoly power over the manufacture and sale of cellophane. It is a competition between du Pont and Sylvania and Celon that has been monopolized by du Pont and which is the important consideration in this case.

The Government does not contend that there is not some overlapping competition between cellophane and these eleven selected flexible packaging materials. However, in the last analysis one must define what is meant by competition. There are all types and definitions of competition, and the word competition has many meanings and no two economists can agree exactly as to the meaning of the word.

As Oppenheim has stated in cases on Federal Anti-trust laws, "Competition has many different meanings. The term always denotes the presence in a specific market of two or more sellers and two or more buyers of a definite commodity, each seller acting independently of every other seller and each buyer independently of every other buyer."

Oppenheim then goes on to discuss various other types of competition, such as perfect competition, pure competition, monopolistic competition and so forth.

10219 Here the definite commodity is cellophane and not all the various markets in which cellophane is sold.

For a definition of monopoly Oppenheim states "Monopoly, like competition, has different meanings. The term always denotes the existence of a considerable measure of unified control over the supply of a definite commodity in a specific market."

Here again we say we have the prerequisite of a definite commodity, in this case, cellophane.

What is the market for cellophane? As Government Exhibit 6041 states: The cellophane field may be described as the field of protective transparency, and in this field cellophane stands supreme." It is not denied by the Government that in the overlapping consumer field served by wrapping materials generally there is certainly fringe competition, a sort of borderline wrapping market. But it is the Government's contention that to have a monopoly under Section 2 of the Sherman Act it is not necessary to have control over all or any of these other fields.

Is it logical to say that cellophane is in competition within the meaning of the Sherman Act with waxpaper and glassine just because the fields in which these products are in represent the largest potential market for cellophane and in which it is gaining the most ground? What relevancy does such a statement
10220 have in a monopoly case where the charge is monopolizing the manufacture and sale of cellophane?

Economic reasoning does not generalize all individual commodities into one or a few conglomerate markets. Demand and supply still operate in relation to specific commodities having distinct characteristics. These markets operate independently in large degree. Areas of overlapping occur as in this case when two or more differently constituted products being interchangeable to a certain degree may vie for the same market demand and use. But whenever a product possesses and retains certain distinct qualities which appeals to consumers' needs and wants, a demand is built and maintained for that product in relation to its own characteristics. This constitutes its markets. We have seen before that certain customers are willing to pay a premium price in order to get cellophane.

Basically, then, markets arise and function for distinct and identifiable products. Anthracite coal has its own market and price structure distinct from that of bituminous, though both are fuels used in many similar uses. Economic students are aware that there is extensive substitution by interchangeability among commodities; so widespread is this, in fact, that those goods are few for which possible substitutes do not exist either in nature or as a result of human invention.

10221 Cellophane has developed its own market, even though this has been at all times a controlled market with one manu-

facturer determining production, production quotas, sales and sales prices.

The fact that a wide variety of flexible packaging materials consisting mostly of paper products exist and are used in packaging is not relevant. Most of these products existed and had their market positions before cellophane appeared. Cellophane has built its own market demand by displacement, of course, but largely through rising consumer preference for cellophane's superior qualities and characteristics. Its market preference in certain uses is still expanding.

Coming now to the market for cellophane, it is apparent that this product has distinguishing characteristics which identify it from other commodities designed for flexible packaging uses.

First, when cellophane was introduced and in the whole period since that time paper was the predominant flexible wrapping material with foil playing a similar role. Yet cellophane usage has expanded as rapidly as it has been made available. Its volume of sales and use has grown regularly with the exception only of the war period of controlled output. This record of growth has been made under conditions of controlled production and prices.

10228 Mr. GESELL. My next objection, if your Honor please, relates to a group of four exhibits, GX 6025, 6026, 6027 and 6028. Those were two orders of the National Production Authority, 6025 and 6026, and then two press releases of the National Production Authority, 6027 and 6028, and I challenge the relevance or materiality of those four documents.

Mr. RENNINGER. They are found on page 8136, your Honor.

Mr. GESELL. These orders, your Honor, purport to set up the basis for raw material controls in the National Production Authority, and I can't see what they have to do with the issues in this case.

10229 Mr. RENNINGER. If your Honor please, as you can remember, these are press releases of the National Production authority of the United States Department of Commerce. The first two are general administrative orders, as you will note, of a governmental agency; 6025 is the general administrative order No. 21-02; 6026 is general administrative order No. 21-06, revised. The purpose of these two documents your Honor——

The COURT. Let me ask you this: Aren't these published in the Federal Register?

Mr. RENNINGER. I am not certain, your Honor, whether they are or not.

The COURT. Because if they were, under statute I have to take notice of them.

Mr. GESELL. But only if relevant or material in the case.

The COURT. That is right. Now suppose we get to that question. What is the relevancy?

Mr. GESELL. I don't challenge the authenticity of them, your Honor.

Mr. RENNINGER. The main purpose in introducing these exhibits is to show the separate, distinct division in which cellophane is placed in the National Production Authority. Cellophane is in a separate class, treated as a separate class, and is controlled by individuals who are interested in the cellophane field generally.

10230 The COURT. On what page is that found?

Mr. RENNINGER. It is only through the chart, your Honor.

Mr. GESELL. Their organizational charts, I guess he is referring to.

Mr. RENNINGER. Yes, on the last page of each one.

The COURT. Let us take page 8140. Where do I find it there?

Mr. RENNINGER. There, that has to do with the papers; the papers are under the pulp paper and paperboard division, which is a part of the Chemical, Rubber and Forest Products Bureau.

In Government Exhibit 6026, page 8144, you will see that cellophane is under the foil and plastic container branch and is a separate sub-section.

The COURT. Which section?

Mr. RENNINGER. The second section, bottom line.

Mr. GESELL. But, your Honor, these orders relate to the classification of these products in terms of their raw materials and not in terms of their function, and therefore I cannot see that that has anything to do with the market problem we have, and we feel pretty strongly about it because the Government has been trying to get Mr. Clunan and others down there to testify to this point and they say they won't testify.

10231 Mr. RENNINGER. They haven't made any such statement, your Honor.

Mr. GESELL. These documents are being brought in in lieu of that.

10232 Mr. MINICUS. What is Mr. Gesell's authority for the statement that these are categorized according to their raw materials rather than their function?

Mr. GESELL. Let me take the first one, on allocation of materials, sub-paragraph 1 of .03 at page 8136. You will see it also in number 5 under .03, also under .04 on the same page. This is the National Production Authority, your Honor, which is trying to control and allocate materials for production, and it isn't concerned with markets.

Mr. RENNINGER. On page 8144, the last page of Government Exhibit 6026, you will see that as far as the other materials are con-

On page 8038 under the heading "Market for Films, (d) That the 1950 market, comprised of thousands of end uses, serves as a one important base for restablishing the market for Du Pont films—Cellophane—Acetate—Polythene and V."

On page 8039 under the heading "The Market for DuPont Film," charts were evidently to be prepared which would show the potential for all du Pont films and each one of them individually broken down into industry classifications.

"The following will be brought out from these charts:

"(a) How potentials are established based on nature of end use, functional characteristics and price.

"(b) That as a result, potentials are not considered over-
lapping and films are essentially non-competitive as their
10267 markets are fields where individual films can best compete.
Some borderline competition on certain end uses will exist—but our safety factor is large unsold potential and our ability to direct and control sales effort along product lines."

On page 8040 of this exhibit, "Step #4—Reasons for Progress to Date."

"This step will illustrate (with samples or other visual means) that progress to date has been accomplished by sales development made possible by a large number of different types of films within viscose group having di.erent functional characteristics."

As examples, "Moistureproofness, Printability, Heat Sealing," and various others.

At page 8042 of the same exhibit under "1950 Sales and Forecast 1955," a statement is 'ade:.

"In covering for'ecast by major end uses reference to be made to basic C[illegible]rt No. 2, showing potential in various industries and pointing that this represents additional volume over cellophane by virtue of characteristics lacking in cellophane.

"Emphasize potentials are on low side due to limited time in field—new uses are bound to be discovered and developed.

"However, point out that for certain Polythene too has
10268 its limitations and for further penetration into markets,
films with still different characteristics are required."

Government Exhibit 6014 is another exhibit showing du Pont's awareness of a separate transparent film market and separate market for cellophane.

This exhibit, a memorandum from W. J. Hart to various branch managers of the du Pont Company, dated March 20, 1950, describes the manner in which the du Pont salesmen should promote du P[illegible]t polythene during the cellophane shortage.

The writer describes the manner in which polythene should be introduced to the trade during the cellophane shortage. The du Pont official states that there are two markets and two approaches

to the selling of polythene. The first market is a logical polythene market, while the second market is the cellophane market in which polythene may be used because of the cellophane shortage. The first market, the polythene market, should be attacked positively and aggressively.

"These are markets or end uses where we believe the properties of polythene make it the best material the customer can use—these are fields outside of the cellophane potential, forecast and applications."

In the second market, where polythene is to be used or attempted to be used as a substitute for cellophane, the duPont salesmen are told to use caution and good judgment."

10269 The du Pont official goes on to state, page 8045, second paragraph:

"Where Polythene is offered as a shortage stopgap the following should be made clear to the customer:

"1. That we believe Cellophane is the logical and preferred material in view of the account's experience with it and that were it not for the shortage we should not be suggesting Polythene."

Then skipping two paragraphs:

"4. That any machine conversion expense the customer may be likely to incur should be viewed in light of the foregoing. As a guide a logical Cellophane application should be viewed as:

"A use where the properties of Cellophane are satisfactory or where Cellophane is regarded by the customer as a desirable package both functionally and as a selling package, cost and all other factors considered."

Next to the last paragraph:

"To repeat then—there are two Polythene markets under present conditions; the logical end uses where Cellophane is inadequate and the logical, established Cellophane end uses where Polythene may be offered as a substitute after the customer has satisfied himself that it will make a satisfactory shortage replacement or that it provides a better package than Cellophane."

10270 Mr. GESELL. I just want to note when your Honor comes to the exhibit that he skipped two paragraphs that put quite a different meaning on what he has been reading.

Mr. RENNINGER. I will be very glad to read those two paragraphs. You mean number 2 and 3? "2. That it be fully ascertained——"

Mr. GESELL. That is not what I am talking about at all.

Mr. RENNINGER. I will let you read them when you get to it, Mr. Gessell.

Government Exhibits 6015 and 6016 describe the importance of the transparent film market. Government Exhibit 6015 is a letter

from Carl M. Loeb, Rhoades and Company to du Pont, dated June 21, 1950, asking for information and data on a recent du Pont market survey for prepackaging foods in transparent films.

Du Pont's reply, Government Exhibit 6016, describes the potential market for packaging foods and points up the importance of self-service stores in which the potential market for packaging foods in transparent wrapping materials is far from the saturation point.

The second paragraph of Government Exhibit 6016 reads:

"Transparent packaging, with the ability to stimulate
10271 desire and increase the volume of 'impulse' buying, has fur-
thered the trend toward pre-packaged foods. Self-service stores, whose business is approximately 80% in food products, are demanding more and more merchandise in transparent packaging. Most of this food volume is in baked goods, crackers and biscuits, candy, meat, and produce, and here lies the field for development."

The second page of this exhibit, or page 8048, the middle of the page:

"The potential market for packaging these food products in transparent wrapping materials is still far from the saturation point. The following points illustrate this:

"Only 25% of the total food stores have adopted self-service to date.

"The percentage of total sales handled by self-service stores has been increasing steadily and promises to rise further.

"Realization of the value of visibility and protection afforded by various transparent films in Baked Goods, Crackers and Biscuits, and Candy is growing.

"Out of roughly 80,000 stores which might be considered logical sellers of prepackaged meats, only 10,000 have installed them, entirely or in part."

Government Exhibits 6017, 6018 and 6019 deal with du
Pont's study of the market potential for transparent
10272 sheets as of January, 1951.

Government Exhibit 6017 explains the manner in which the market potential report and the charts attached thereto were prepared. The document states that there is a total potential of 780 million pounds for du Pont films. That is found on page 8050, your Honor.

The COURT. We will recess this case until Tuesday, May 27, at 10:30.

(At this point the trial was adjourned until Tuesday, May 27, 1952, at 10:30 o'clock a. m.)

10280 TUESDAY, MAY 27, 1952, 10:30 O'CLOCK A. M., E. D. S. T.

Present: As before noted.

The COURT. Proceed, Mr. Renninger.

Mr. RENNINGER. If your Honor please, at the close of last Friday's session the Government was discussing the various markets wherein cellophane being primarily a special flexible wrapping material is being sold. We have seen that from practically every du Pont document, the du Pont officials hardly, if ever, mention the papers such as waxpaper and glassine. When the du Pont documents do consider a market in which cellophane is being sold it always the transparent film market, and these documents, in describing the transparent films, always point out the fact that these transparent films have many characteristics inferior to cellophane and that they are used primarily for specialized purposes and in fields that are only overlapping into the cellophane market to a very minor degree.

Turning again to Government Exhibit 6017, at page 8050, which was under consideration at the close of Friday's session; we find that this exhibit explains the manner in which the market potential for transparent sheeting, and the charts attached thereto,
10281 was prepared. The document states that there is a total potential of 780 million pounds for du Pont films. The report states, and I quote:

"These potentials were built up from an analysis of each market in which one of our films had a logical use. There are 60 to 70 different markets comprised of thousands of end uses.

"In each product end use the requirements for a film were analyzed and then the one of our films which most nearly met the requirements, that is, functional characteristics, effectiveness of application, such as machine efficiency, merchandising effectiveness, acceptability to price and so forth, was assigned to the product and the potential volume was accredited to that particular film."

Here, we see that in this market potential for transparent sheeting, there are certain end uses that are applicable to one film and not applicable to another. Government Exhibit 6017 also points out that in the food and tobacco industries, cellophane films are the logical candidate; whereas, in the fresh produce industry there is a potential for each of du Pont's films, that is, cellophane, polyethylene, which du Pont calls polythene, V film and cellulose acetate.

10282 The last paragraph of this document, your Honor, at page 8052 sets forth, I think very clearly, not only the position of the du Pont Company itself but also the Government's approach to the substitute materials problem, and I quote:

"Consequently, potentials are not considered overlapping and films are essentially non-competitive as their markets are fields where individual films can best compete. Some borderline competition on certain end uses will exist but our safety factor is large

unsold potential and our ability to direct and control sales effort along product lines."

Government Exhibit 6018, which is found on page 8053, is a du Pont report entitled, "Market potential for transparent sheeting as of January 1951." In the introduction of the report it is stated that a decision as to which du Pont film, type and kind, which should be used in each of the markets, was obtained from the technical section.

On page 4 of the report, page 8058 of the bound volume it is stated that:

"Cellophane is the principal film in the transparent sheeting industry representing a potential of 560 million pounds of 71.7 per cent of the total."

On page 6 of the report, page 8060 of the bound volume, it
10283 is stated that the bread and cake industry, at present, holds the largest potential for transparent sheeting, or 182 million pounds.

Cellophane is recommended as a transparent material to be used in the bread and cake market, the meat market, and the crackers and biscuit market. While in fresh produce, cellophane shares the market potential with other films.

At page 8062 of the bound volume, the third paragraph states that:

"Cellophane was designated as the film for most lightweight food and vegetable items such as cherries, grapes, cranberries, peaches, lima beans, string beans, spinach, peas, one-half of the tomatoes and so forth; polythene for dry onions and heavy produce items such as potatoes, apples, and oranges; cellulose acetate for mushrooms and one-half of the tomatoes; and V film for carrots and head letture."

The document also describes the market for polythene film, cellulose acetate film and V film. It is interesting to note that under cellophane acetate, page 8067, the 1950 sales of cellulose acetate were over fifty per cent for non-packaging purposes. Du Pont also estimated the industry potential for cellulose acetate film to be about one-third for packaging purposes and two-thirds for non-packaging purposes.

10284 As for V. film, du Pont estimated that its largest potential would be in the electrical industry, in tapes and military uses.

Government Exhibit 587, which impounded document No. 46, entitled, "Survey of Cellophane Future Capacity, Economics and Competition," by D. H. Edwards and W. W. Hess, dated December 15, 1949.

At page 10 we have again a recognition of a separate cellophane

market and a separate market for transparent films, and I quote from page 10 of this report:

"An analysis of the position of cellophane against non-cellophane competition is not a matter of simple and direct comparison because, while non-cellophane and cellophane films markets overlap, prices are different, and the combinations of useful properties in the non-cellophane films are by no means identical with those of cellophane. This holds for acetate film which is clear, pliofilm and polythene which are tougher, and Saran which is more moistureproof. The difficulty of comparison will continue until some other film can do cellophane's entire job or until another film reaches cellophane's cost. Until then, non-cellophane films will attack cellophane marginally and find markets peculiarly thereon as they do now."

10285 The report then goes on to consider possible new films, but considers that they will not actually affect, to any great degree, the cellophane market.

We have just discussed the transparent film market and the part that cellophane plays in that market. From the du Pont documents just discussed it can be seen that du Pont itself considers that actually the cellophane market and other transparent film markets as being non-competitive. It is admitted by the Government that there are certain instances where the cellophane market and the non-cellophane market overlaps in their fringe uses where the different wrapping materials, maybe to a certain minor degree, are in competition for certain end uses.

What is the market for cellophane? In considering a market for cellophane there must be present certain supply and demand forces which create that market. We have seen the tremendous growth of the production and sale of cellophane from the very beginning. This demand is not only felt by du Pont, but by Sylvania itself.

If your Honor please, I would like to discuss Government's Exhibits 564 and 565, which are the affidavits of Mr. Replogle and Mr. Stiner.

As your Honor knows, you have not ruled as to the admissibility of those documents. I thought I might discuss parts of
10286 them and if the documents are not admitted my comments thereon would be stricken from the record.

Mr. GESELL. If I may state, your Honor, that is a highly improper procedure.

The COURT. I passed on that Friday.

Mr. GESELL. These are not admissible documents in evidence.

The COURT. According to Mr. Renninger they are admissible, and I think that the procedure he has suggested is a fair one be-

cause if they are stricken they are going to be actually stricken from the record, that is, any statements he makes with respect to the matters contained in the affidavits.

Mr. GESELL. They are going to lead to counter-comments and, I should think, a long trial on inadmissible evidence.

The COURT. It won't be that long. Proceed.

Mr. RENNINGER. Government Exhibit 564, the affidavit of Mr. H. H. Replogle of the Sylvania Company, states at page 8078, beginning at the top of the page:

"Because of insufficient productive capacity there were many cellophane outlets not fully exploited by the Sales Department. The baking industry had the greatest potentiality in this respect, particularly with respect to white bread. It was variously esti-
mated during the base period that between forty million and
10287 fifty million loaves of white bread were produced each day
and it would require up to 500,000 pounds of cellophane daily to wrap that quantity of white bread. On an annual basis this item alone would require one hundred eighty million pounds of moistureproof cellophane. During the base period less than one-half of one percent of the white bread sold was wrapped in cellophane, and that is probably true even today. Nevertheless, in the ten-year period starting with 1939 this company's poundage sales to the baking industry tripled.

"Until 1932 even fancy breads were normally wrapped in waxed paper. Sylvania then began to work with various bakers' organizations in the development of cellophane wrapped bread. It was observed that most women like to see how well baked the bread is, and cellophane makes the bread readily visible. It soon developed that if one baker wrapped fancy bread in cellophane, competitors would follow suit. This would be true also with respect to white bread if cellophane wrapping could be adopted. The supply of cellophane was and is inadequate, consequently the wrapping of bread in cellophane is confined to the fancy types. However, due to competitive conditions in certain localities white bread is wrapped in cellophane, such as for instance in Baltimore. Quite
often cellophane is used by the baking industry to combat
10288 a drop in sales. An illustration of this is the fact that the
A & P stores in certain areas wrap white bread in cellophane. In Reading, Pennsylvania, three local bakers could not meet the competition of outside bakers. As a result they were forced to get together and wrap white bread in cellophane in order to stay in business. The price differential between moistureproof and waxed paper is comparatively small, about three mills per loaf, so quite obviously the reason that even today less than one-half of one per cent of white bread is wrapped in cellophane is due

solely to insufficient supply. Beginning about 1933 the baking industry itself had an abnormal growth because of the fact that housewives were giving up the home-baking of bread."

This document, I think, points out the peculiar and unusual characteristics of cellophane and how its demand and consumer acceptance is received in the market.

Government Exhibit 565, the affidavit of Clarence B. Stiner, of the Sylvania Company, reference is also made to the growth and importance of the cellophane market.

At page 8086 of this document there is a reference to the early use of cellophane:

"In 1925 he interested the"—that is, Mr. Stiner—"Woolworth Company in the use of cellophane for wrapping novelty
10289 items. Although cellophane was then relatively expensive there were some novelty items with a substantial gross profit margin that permitted the use of cellophane in promoting the sale of such items. Cellophane itself was a novelty back in those years and because of this feature, and also because of product visibility it was found to be an important sales-stimulator."

And again at page 8088 we also have under discussion as to the baking industry, which Mr. Smith of the du Pont Company discussed at great length. The first full paragraph on page 8088 states:

"The baking industry represented the greatest sales potential for the cellophane industry, so much so that there was not enough cellophane productive capacity to handle the volume of business available. Until 1935 deponent sold to the Ward Baking Company its entire requirements but deemed it advisable to suggest to this company that it procure some of its cellophane from du Pont. At that time we were selling to Ward Baking Company in excess of $500,000 of cellophane annually. The heat-sealing and packaging developments were the principal factors that stimulated the very large demand for cellophane by the baking industry. In the first place, when glue was used to seal cellophane it gummed up the machines and caused a large loss in production, both of cellophane
and the product; and secondly, the Board of Health in many
10290 communities would not approve the use of glue on bread wrappers.

"With the introduction of heat-sealing, all large bakers at one time or other attempted to secure cellophane to wrap white bread as well as fancy bread, sweet doughs, cakes, cookies and biscuits. It was found, however, that neither du Pont nor Sylvania was able to furnish a sufficient supply to meet the requirements for white bread. Deponent went into this matter in great detail with the General Baking Company, one of the largest bread baking com-

panies in the country, and intensive studies were made as to the relative cost of wrapping white bread with cellophane as compared with the customary waxed paper. It is his firm belief that, had Sylvania been able to satisfy their requirements, General Baking Corporation would have used cellophane exclusively to wrap white bread."

All of the various quarterly, semi-annual and annual competitive reports describe in great detail this cellophane market. In practically all of these reports we also see the always continual shortage of cellophane. As an example, Government Exhibit 88, the Annual Competitive Report for 1946, states at page 2:

"The packaging field is still broadly a domain of cellophane to the extent that the industry is capable of supplying the demand."

10291 This report, to a very limited extent, briefly discusses certain non-cellulosic films, but considers them in reality only specialty films, and much higher in price than cellophane. Nowhere in the report is any reference made to any possible competition with any of the papers.

Defendant's Exhibit 595, the Annual Market Analysis report for 1948, states at page 1147:

"The principal markets for non-viscose films have been competitive with cellophane only to a very minor degree up to this time. Some are used very little or not at all in the packaging field—others are employed principally for specialty uses where cellophane is not well adapted—none have been successfully introduced into any of cellophane's main markets, due to their inherent shortcomings. In all cases, these films are sold at higher prices."

Here again, your Honor, we see that cellophane is a separate, distinct product, in a market of its own, and that the other transparent films are only competitive to cellophane for certain fringe uses. No reference is made as to the various papers.

This exhibit then goes on to discuss each of the other transparent films, and in each instance a statement is made that none of

10292 them are actually considered to be competitive to cellophane.

As an example, on page 7 of the report a statement is made that "Pliofilm is principally a packaging film, but is an active competitor of cellophane only in those fringe uses bordering markets that need greater moistureproof protection than cellophane provides."

In a discussion of polythene, the report states, at page 10, that penetration into the cellophane market is not expected to any major degree. Similar statements are also made with reference to Cry-O-Vac, Saran and other films that talk about the poor machine-running qualities and other characteristics.

An interesting statement as to cellophane shortages is contained in Government Exhibit 6020 at page 8091, a cellophane sales monthly report for March of 1950. The third paragraph of this exhibit states, "While there was general acceptance in our trade that it was necessary to allocate our production, as announced in our February 28th letter, in the interests of proper servicing of the business, there was also criticism that we encouraged the expanded use of Cellophane and then limited its sale and prevented its adoption in the very directions we had been advocating. Criticism has been particularly serious as a result of our selling effort on white bread, prepackaged fresh meat, fresh produce and
10293 fractional cracker packaging."

On page 8092 under "Industry Comments" there is this statement:

"Generally, our customers in the food industries, with the exception of those in the candy industry, report business as favorable with the outlook for the next few months as exceptionally good.

"The limitations we have placed upon supply of film will retard customers; plans for expansion in self-service prepackaged meat and produce, as well as Cellophane adoptions on white bread, fractional packaging of crackers, Cellophane packages of sliced bacon, margarine and butter packaging, ice cream, and other items. Serious unsatisfied demand for Cellophane also exists in the cereal industry, nuts, potato chips, and frozen food. Alternatives are to get film from competition or return to wax paper, glassine, etc."

It is interesting to note that during this period of shortage, many of the direct users of cellophane, when they could not obtain cellophane from du Pont and Sylvania, bought Cellophane from abroad at a much higher price in order to have a supply of cellophane for their packaging uses, rather than use any of the substitute materials.

Government Exhibit 6021 at page 8096, a memorandum from R. R. Smith on foreign imports dated May 5th, 1950,
10294 shows that A & P attempted to purchase British cellophane and that the National Biscuit Company purchased British cellophane at a delivered price of 72 cents per pound. This is a clear indication that there is a separate cellophane market based on consumer demand where other materials are not satisfactory for the intended end use.

In Government Exhibit 6022 we have the peculiar situation——

The COURT. Is that last that you just read to me a quote?

Mr. RENNINGER. No, sir.

In Government Exhibit 6022 we have the peculiar situation where du Pont, as a manufacturer of cellophane, is recommending to a client that he purchase a substitute material in place of

cellophane, if such a substitute material would be satisfactory for the intended end use.

This exhibit is a letter from C. F. Brown, Director Cellophane Sales to Mr. Victor McLean Day, New York, dated September 28th, 1950. The first paragraph states:

"I wish to acknowledge your letter of September 26th, covering your correspondence with Mr. Pierre S. du Pont and stating that you have a client who is ready to place a preliminary order for two million pounds of Cellophane.

10295 We regret very much to advise you that Cellophane has been in short supply since early this year and, consequently, we have been forced to allocate our entire production among then-existing customers. Since that time, we have been under great pressure from them for greater quantities than we can supply."

And then again at the next to the last paragraph from the bottom:

"We would like to discuss with him also the intended end-use of the material, as, in similar cases in the past, it sometimes has developed that Cellophane is either not entirely suitable or not the best available material for the purpose. We may be able to recommend certain other films or materials for his consideration and evaluation."

If your Honor please, I would like to just discuss three or four minor quotes from some of the depositions. I feel that the direct quotation here gives a better idea of the cellophane market than some cold one-sentence statement found buried within a mass of other statements.

Elmstrom in his deposition at page 76–77 was asked this question:

"Question: Once having wrapped a product in cellophane, do you find that because of consumer acceptance of the cello-

10296 phane wrapped product that it is difficult to remove that product from cellophane?

"Answer: I don't think that we have gone through much of that, but I think we would feel it competitively if we removed it from cellophane and the other of our competitors didn't. I think we would be penalized.

* * * * *

10302 Mr. GESELL. That is on page 223 and 224 of the summaries, your Honor.

Mr. RENNINGER. This, your Honor, is typical examples of the cellophane market.

Government Exhibit 6023 at page 8098, a Sales Forecast for 1951, which is written by R. R. Smith, discusses the cellophane shortage and the anticipated increase in cellophane production in

about a year. Mr. Smith seems to be worried as to whether duPont will meet its forecast for 1951 and asks various questions that are to be answered by the salesmen. Some of these questions as set forth on page 2 of this memorandum, or page 8100 of the bound volumes, are:

"C. What is the status of Cellophane inventories in converted and unconverted form? How will this affect forecasting in the account?

"D. How deeply have competitive non-viscose films penetrated and to what extent will they affect forecasting sales of viscose film? An example would be Pliofilm in mean and/or produce prepackaging.

"E. What is the status of wax and glassine inventories? How long will it be until Cellophane is readopted where it was replaced by wax or glassine, etc., due to shortage? In instances where combination wraps have been adopted as an emergency measure, how long before they return to all Cellophane due to inventories?"

10303 Government Exhibit 6024, a Monthly Sales Report for May of 1951, also discusses the shortage six months later. Another indication that cellophane in reality is a separate and distinct product having a market of its own can be found in the treatment of cellophane as such by the National Production Authority. Government Exhibit 6024 on page 2 or 8103 of the bound volumes states:

"Du Pont made a presentation on Friday, June 8th, to the Chemical Division and the Containers & Packaging Division of the N. P. A. covering the essential nature of Cellophane in the civilian economy. This was well received, especially since the presentation showed that 93% of Cellophane is used to package food and agricultural products.

"Up to the present time no controls over distribution of Cellophane have been contemplated but N. P. A. believe this will be necessary if essential materials continue in short supply."

At this conference with the officials of the National Production Authority the duPont Company presented a booklet discussing the importance of cellophane and why it should be considered as essential in the national economy. This booklet is Government Exhibit 6092, found on page 8107 of the bound volume, and this booklet was also partly discussed during the cross-examination of Mr. R. R. Smith.

10304 On the chart opposite page 2 of the booklet or page 8110 of the bound volume there are set out in detail all the various types, the characteristics, and uses for cellophane. Various other charts in the booklet describe the 1950 cellophane dis-

tribution by industries and distribution to the major food industry. The booklet describes the importance of packaging in self-service markets.

Page 16 of the booklet or page 8117 at the top of the page states:

"Cellophane as a packaging medium helps to market a food product by keeping it clean, preserving its original freshness, and by permitting examination of merchandise before purchase. The rapid growth of self-service meats is a good example where a special transparent wrapper is essential."

Page 17 of the booklet or page 8117 of the bound volume, the lower part, reads:

"Cellophane advantages . . . Applied to Food Products—Keeps it clean; Keeps it fresh; Permits examination."

Again on page 18 we have that statement that "A transparent flexible film is as important in the pre-packaging of produce as it is with self-service meats."

Other pages of the booklet describe the importance of the cellophane wrapper for bakery products and cheese products, and again there is the stress of the importance of a transparent flexible film for those uses.

On page 37, 8127 of the bound volumes, there is 10305 reproduced a letter from a small cereal manufacturer in Minneapolis describing the importance of cellophane in the development of his business, and the circled parts of the letter reads:

"There is absolutely no question in the writer's mind whatsoever that we would have failed in the early stages of our company had it not been for the then relatively new product, cellophane, which we began to use. It was low in cost both from a material standpoint and labor standpoint as compared with other products which were available for packaging."

Other parts of this document describe the importance of cellophane to converters and fabricators, and various uses for cellophane during World War 2, and a list of the raw materials going into the manufacture of cellophane.

On page 48 and 49 of this booklet or 8134 reads:

"To sum up * * * Cellophane is a protective packaging material essential to today's national economy for the following reasons:

"1. It keeps food fresh, conserves quality and prevents waste important to the public health and welfare.

"2. It protects BASIC foods such as bread, meat, produce, cheese, frozen foods, etc., as they are moved through modern channels of distribution. These items are kept fresh and sanitary throughout the entire cycle from manufacturer or producer to the consumer.

10306 "3. It cuts down food handling costs and, by aiding self-service, helps conserve manpower.

"4. It is low in cost and economical to use. Because of high yield per pound, it aids in conserving essential raw materials.

"5. It serves important military uses—is already included in over 50 Government military specifications.

"To sum up—Cellophane is a protective packaging film essential to today's national economy."

If your Honor please, you asked me relative to Government Exhibits 6025, 6026, 6027, and 6028, which are press releases and general administrative orders of the National Production Authority. I have found out, your Honor, that these documents are not in the Federal Register. Under those circumstances, I guess the Government will withdraw them from its case.

Mr. Gesell is continualy stating that the Government is not looking at the realities of the situation in our discussion as to whether cellophane is or is not in competition with all these other flexible packaging materials. However, it is very easy for Mr. Gesell to argue as an advocate the so-called great competition between these materials and cellophane.

10307 The Government has stated previously and admits that there are certain fringe uses or overlapping markets where the flexible packaging materials are in competition, just as the same situation might prevail in certain instances with glass jars or tin cans or cardboard boxes; but that does not prevent there being a separate and distinct market for cellophane. And above all, whether there is or is not competition between cellophane and the other flexible packaging materials does not prevent there being a monopoly of the product cellophane within the meaning of Section 2 of the Sherman Act.

But I think what is more important than the statements of Mr. Gesell as to competition is the attitude of the duPont officials themselves as to whether they actually consider that these flexible packaging materials are actually in competition with their own product cellophane.

On looking at the duPont documents as a whole it is quite evident that the duPont officials themselves, at least to the development of a defense to this suit, hardly ever considered wax paper or glassine at all as being competitive with cellophane. For one thing, the prices for wax paper and glassine were so very much lower than the price for cellophane that it is obvious that the du Pont officials actually considered these products in an entirely separate market. As to the transparent films, numerous references were made as to these products by the du Pont officials, but in practically every instance they were spoken of dis-

[illegible] paragraphs or that they were competitive in only certain fringe uses. Most all of the documents introduced into evidence on Friday afternoon and this morning portray very vividly the awareness of the du Pont officials that actually there is no real competition between cellophane and the papers or films.

[illegible] This awareness has been pronounced from the very early days of du Pont's entry into the cellophane market and has been reiterated by the du Pont officials down through the years.

In Government Exhibit 392, already in evidence, which is the report of the committee to investigate marketing and commercial possibilities for cellophane during the period of the negotiations with La Cellophane, dated April 14, 1923, reference is made to other wrapping materials since the report states that cellophane's principal use is for such a purpose.

Comments are made relative to glassine, cellulose acetate, gelatin, and tinfoil, as being the principal wrapping materials used at that time. However, the last two named products have practically passed out of the picture.

The report, on page 9, states that cellulose acetate is too high in price to be competitive with cellophane. At page 5435 of Government Exhibit 392 there is stated: "Glassine paper has probably the broadest use of any of these articles due principally to its low cost, as it is in no way comparable as regards quality with any of the above products."

The report also states on page 9, or page 5437 of the bound volume: "Undoubtedly glassine paper is so inferior that it [illegible] belongs in an entirely different class and has hardly to be considered as a competitor of cellophane."

Now, your Honor, this is as far back as 1923. The only reference in this whole report to waxpaper is found on page 9 of the report, and that is only in a listing of prices for all wrapping materials. Waxpaper was not even dignified by a mention in the text of the report.

Does this sound as if the du Pont officials consider glassine or even waxpaper to be competitive with cellophane?

Again in 1927, Government Exhibit 6029, a Sales Bulletin from E. M. Hervey, assistant sales manager addressed to All Salesmen, which is entitled "Competition," states:

"Not so long ago there was no such thing as competition in the name of cellophane. Today, while we admit that certain competitive factors have come into the field, a clean-cut analysis of our product and service as compared with the importers' shows that the only quality the competitive product has comparable to cellophane is transparency."

It goes on to point out various advantages of du Pont cellophane. Here we see that du Pont considers its competition to be from imported cellophane only.

10311 Government Exhibit 6030 and 6031 found on page 8153, 8154, 8155 of the bound volume, portrays another example of du Pont's conception of what its competition actually is.

Government Exhibit 6030 is a letter from Buffett and Company to L. A. Yerkes, dated February 2nd, 1939, relative to an inquiry from a stockholder in du Pont as to certain products which the stockholder had heard might be in competition with cellophane.

Government's Exhibit 6031

Government Exhibit 6031, Mr. Yerkes' reply, reads as follows, on page 8155:

"The competitive wrapping materials which you speak of—Kodapak, Pliofilm, and so forth, have been on the market for several years and obviously are in a position to obtain some business. These materials, however, would come more under the heading of specialties rather than direct competitors of "Cellophane", although there are some users where the two are in competition. By and large the prices of these competitive materials are higher than "Cellophane."

"The recent price reduction in 'cellophane' was made in the belief that a lower price would widen the distribution.

"The only entirely similar material which is a competitor of "Cellophane" is "Sylphrap" made by the Sylvania Indus-

10312 trial Corporation." This company has also of the importance of polyethylene in the manufacture of camelback, used in the manufacture of automobile tires. And this use is one of the important outlets for polyethylene today.

Government Exhibit 6032, at page 8156 of the bound volume, a memorandum from W. G. Hunter to A. Kunsman, dated June 11, 1948, subject "Non-viscose films" speaks of possible competition between polyethylene and cellophane. The first paragraph reads "At today's prices, 78 cents to 87 cents a pound, and at the present stage of development, polythene is not in a competitive position with cellophane in the frozen food market. However, if 30 cents flake and a film selling price of 56 cents a pound becomes a reality, polythene can become a real factor in this industry."

The article goes on to discuss the various disadvantages of polythene and the possibility that some day the price of polythene might be reduced.

In Government Exhibits 6033 and 6034, we have an example of the research and assistance given to W. R. Grace and Company

by du Pont when Grace was contemplating entering upon the manufacture and sale of cellophane. In these exhibits and subsequent exhibits we see the great detail, the cooperation, as well as numerous reports given by du Pont to Grace to assist Grace in its market studies.

10313 Government Exhibit 6033, a letter from G. A. Zeigler, page 8158, the second paragraph:

"There has come to the attention of the officials of our company the recent news item concerning the new plastic plant at *at* Parkersburg, West Virginia. In this news item it is reported that the plastics produced at this new plant will include 'lucite acrylic resin; polythene, used in the electrical chemical packaging and housewares industries, and nylon.' As would be expected, from the effect that a possible use for the materials produced at the Parkersburg plant is packaging, we would like to know just how the material produced at Parkersburg to be used in packaging will affect the cellophane packaging field.

"It is personally believed that this material will be used in fields in which cellophane does not now compete. If this is true, we would like confirmation of this, as well as brief comments on the type of plastics to be produced, approximate poundage that could be considered for the packaging field and any conclusions you may venture on possible future use of the new plastics in packaging."

The answer by du Pont, Government Exhibit 6034, states:

"Your Cellophane Project Report"—that is Grace's—"Your Cellophane Project Report, in Section IVa, contains a good summary of the positions of polyethylene (polythene)
10314 and other packaging film materials. Since your study, nothing has happened to change our views on the subject. Polythene has properties that are expected to lead to its use in a number of applications where cellophane is not well adapted. For example, you may have noted the editorial staff report on 'Polyethylene Packaging for Chemicals' in July, 1948 issue of 'Chemical Industries.' Polythene is expected to supplement rather than to supplant cellophane. This should be confirmed by the market research which you say is being conducted for you."

Government Exhibit 6035, at page 8160, is a memorandum from C. F. Brown to Mr. J. L. Fabs, both of the du Pont Company, dated October 20, 1948, entitled "Cellophane for Bread Wrapping."

I don't wish to read this entire document although I consider it important in view of various statements made by Mr. Smith of the du Pont Company while on the stand. I would like to read the last paragraphs on page 8162, the last page of this exhibit:

"Because of the tremendous potential in white bread and the large number of bakers, our policy has been always to urge ex-

treme caution in forecasting white bread. This forecast, therefore, represents only business we are quite sure we can get with normal selling effort.

10315 "However, due to the extremely competitive situation that exists in the white bread market, new adoptions of cellophane are expected to influence the spread of use in local markets even more rapidly than on other products of the industry. This has always been true in the past and it is happening today where adoptions for white bread are made.

"We have mentioned above that progress in the bread field was measured by the creation of a cellophane consciousness as well as the ability to sell the advantages. As one gauge of the existence of such consciousness in the baking industry, it is interesting to note the action of waxpaper converters.

"Several leading wax converters, sensing from the baking industry this consciousness of the value of cellophane, have installed printing equipment for cellophane, even though sufficient film is not now available to them. Their explanation is that they see a growing change imminent in bread packaging and are preparing to go along with it."

What Mr. Brown apparently is worried about here is that if cellophane is started as a wrapper for white bread it will spread all through the industry and they want to make sure they have enough production to take care of it.

The COURT. I was interested in Mr. Brown's words, "other products of the industry." What is he talking about?

10316 Mr. RENNINGER. I presume, sir, cake and cookies and things of that sort, or perhaps even variety breads.

The COURT. The baking industry? Is that what he is talking about?

Mr. RENNINGER. Yes, sir, as I understand.

Government Exhibit 6036 is a letter from J. L. Fahs of the du Pont Company to W. R. Grace and Company dated February 2nd, 1949, found on page 8163 of the bound volume. The letter reads:

"Enclosed are memoranda reflecting a du Pont concensus on the three points you questioned when you were here on January 20th. The memorandum regarding white bread refers to and supplements the material transmitted with my letter of October 22nd, 1948.

"Pliofilm has been promoted aggressively for many years, and yet its sales volume is only a few per cent of cellophane's. It probably would be used only where cellophane is not suitable, if the supply of cellophane were adequate. Similarly, but on a larger scale, polyethylene film is expected to find its own fields of use rather than to make serious inroads into the market for cellophane."

Here is a du Pont official talking, as late as 1949, as to the use of pliofilm and polyethylene.

Government Exhibit 6037, found on page 8164, is a memorandum from C. F. Brown to J. L. Fahs, both of the du Pont Company, entitled "Questions of W. R. Grace and
10317 Company concerning markets and competitive films."

Mr. Brown sets forth the meeting that they had with Grace and Company the prior week and the questions Grace has asked. These questions are:

"1. What is the position of cellophane in the white bread field, particularly with respect to future expansion?

"2. What is the present status and future threat of pliofilm and polythene in the fields of self-service meats and fresh produce packaging?

"3. To what degree is polythene considered competitive with cellophane, both specifically and broadly?"

Mr. Brown goes on to answer these questions. As to the first one he says:

"It is our opinion that we can offer nothing in the way of arguments in favor of cellophane as a packaging material for white bread that was not set forth in that memorandum with its attachments."

That is Government Exhibit 6035 which we previously discussed.

Reading from the top of page 8165:

"In December 1948, our sales to the baking industry for use on white bread were at a rate of approximately five million plus pounds per year. Our 1948 sales forecast was eight million
10318 pounds, which we are certain could have been sold were the film available. All of this was without active promotion. We have never, incidentally, directly promoted cellophane for white bread.

"Therefore, this use at the present time and the use during the past has been primarily the decision of the baker himself. It has been based upon his competitive position, his need for volume and his observations and experience that cellophane is a direct and powerful factor in increasing sales under highly competitive conditions. Our present position regarding the active promotion of cellophane for white bread has been explained and is covered in our memorandum of October 20th. Therefore, it would be indicated again that the ability of either du Pont or any other supplier to sell cellophane for white bread beyond actual demand is based largely on the ability to project the sales arguments outlined in our October memorandum and develop in the mind of the user the need for transparency in a competitive field."

The COURT. We will take a ten-minute recess.

(At this point a brief recess was had.)

Mr. RENNINGER. Government Exhibit 6038 at page 8166 of the bound volume is a letter from Mr. A. E. Buchanan, Jr. to Mr. J. L. Fahs, both of the du Pont Company, dated February 1st, 1949. This document reads as follows:

"W. R. Grace and Company has asked the following
10319 question:

'To what degree is Polythene competitive with cellophane, both broadly and specifically?'

"Our answer is:

"Polythene of a quality now manufactured has only a small impact competitively on cellophane, principally because it is not transparent, it is too limp, is hard to glue or heat seal, is difficult to print, is permeable to volatile oils and flavorings, has poor surface slip and high static, and its cost is higher."

The last page of this document:

"As the volume of production of polythene increases, the cost is expected to decrease. With better costs and improved quality, polythene film will increase in its competition to cellophane,—As a guess, in the next ten years the extent might be of the order of 15,000,000 to 20,000,000 pounds annually. At the present time it is difficult for us to anticipate penetration of polythene into cellophane markets beyond this rather insignificant poundage. We do, however, visualize considerably larger volume for polythene film in applications in which cellophane has inherent shortcomings, such as fabric replacement uses."

Government Exhibit 6039, a du Pont document, dated January
28th, 1949, discusses the "packaging of perishable foods"
10320 and speaks of the importance of cellophane in the self-service merchandising of fresh meats and the various disadvantages of pliofilm, polyethylene, Saran, and other polymeric films.

Government Exhibit 6040 is a document from J. L. Fahs of du Pont to Mr. Benjamin H. Oehlert, Jr., of W. R. Grace and Company relative to a list of representative bakers and produce packaging concerns, in the Eastern United States, that Grace evidently wished to interview.

The second paragraph of this letter reads:

"To supplement your technical survey, I mentioned the paper entitled 'The Future of Plastic Films,' by M. R. Gerow and R. G. Kadesch, of Plastics Division, Reynolds Metals Company, New York, presented at the Fifth National Conference of the Society of Plastics Engineers. du Pont obtained a copy of the paper from M. Scott Moulton, Chairman, National Publications Com-

mittee, Society of Plastics Engineers, Inc., 324 Rose Building, Cleveland, Ohio.

"Attention is called to their conclusion, with which du Pont concurs, that '* * * the newer films will not necessarily replace the older films and their uses, but will broaden the use of films in the various markets in which they fit. Likewise, the development of new equipment will broaden the use of the newer films into markets that the present films cannot perform in properly.'"

10321 Now, your Honor, in retrospect, what have the facts as presented by the Government done to the defense of a theoretical and arbitrarily selected flexible packaging market? In the final analysis the real facts have shown that cellophane within the meaning of the Sherman Act is not competitively within a general packaging materials market or a flexible packaging materials market or a transparent wrapping materials market, but cellophane is in a market separate and distinct unto itself which has demand and supply factors traceable to a definite commodity that is cellophane.

Practically all of the exhibits the Government has introduced on this phase of the case are the defendant's own documents written by its own officials. They speak of some competition coming from transparent films, but not from opaque and sometimes translucent paper wraps, and this so-called competition with the transparent films is described as fringe or overlapping competition which from the evidence has turned out to be not competition at all, but purely uses for the other transparent film where cellophane was not adaptable or where shortages have been operative. So more forcibly than ever it is proven that cellophane is a unique and separate product having its own market and consumer preference and demand.

The evidence clearly shows, one, that cellophane is in a 10322 separate and distinct price bracket. Its price is much higher than the paper wraps and lower than the other so-called transparent films and also foil.

2, that the protection by cellophane is as good and in many cases better than the paper base materials.

3, that it is transparent as compared to the opaqueness of paper base materials. In some instances they have translucency.

And, 4, that it has a combination of physical characteristics not found in any one of the paper base wraps or other transparent films.

All of these characteristics make cellophane a unique and separate product which has a distinct consumer preference for which there is no adequate substitute.

The Government's evidence emphasizes the defendant's own slogan. The slogan that points out cellophane's uniqueness and

the slogan that defeats du Pont's own defense is "cellophane shows what it protects, protects what it shows." Therein lies the cellophane market of protective transparency built up by consumer preference and demand.

Mr. GESELL. Your Honor, we don't feel that this is an appropriate time to make a full dress argument as the Government has just done on the market case. For us to do that would probably take close to a day's time. What I would like to do is deal with some of the specific contentions advanced by the Government
10323 as this issue gets sharpened up at the close of the case and then discuss a few of their particular documents.

Now, as I understand, what Mr. Renninger has just said and what he said when he started off on Friday, he said that cellophane is unique because it has a different price than any other flexible wrapping material that it has a different quality than any other wrapping material, and that therefore the market consists of those customers who at a particular given instance want cellophane. He says it is in a separate price bracket, it is transparent, it protects, and it has this distinct combination of physical characteristics. Well, that is what he says, and he would have your Honor ignore what buyers do, what sellers do. He would have your Honor ignore the fact that the materials are in fact sold interchangeably and that shifts are made on thirty days notice or less, and of course he ignores the fact that the materials involved perform the same function in that they are used up and that there is a constant shifting. Now, there is no fact basis in the case for ignoring those facts—what the buyers do, what the sellers do, and what happens in the market place.

These depositions, when your Honor gets to the summaries, will show that we have had producer and purchasers and con-
10324 verters, all of whom uniformly have talked about what happens in the market, and have talked about what happens as between cellulose acetate and cellophane or pliofilm and cellophane or foil or glassine, and those are part of the factors you have to take into account.

To me the most startling thing about this entire presentation is that it comes back again to a purely theoretical position. It is so theoretical that Mr. Renninger asked you to believe that when one material displaced another on a package that is not competition, and he so stated to your Honor. In other words, when cellophane takes an item away from waxpaper or glassine takes an item away from cellophane for a particular customer and a particular account that is not competition, because at the given instance that the customer changes from waxpaper to cellophane, even though he is only going to use it for ten days or twelve days, whatever it is, he at that instant is part of this theoretical cello-

phane market. Well, I don't think that that is a realistic position in terms of our experience, and I don't think it is realistic in terms of the facts of this case. This is not a case involving theoretical substitutes that may come into play, your Honor, at some time; it is a case where the substitutes, if you will, were there first and where cellophane has sought in every way it can to penetrate existing markets.

10325 I would like to take this definition for a moment that the Government offered and carry it to its logical conclusion. They lumped together, your Honor, under the heading "cellophane" some fifty to sixty different types of materials. They are different in their qualities, they are different in their uses and they are sold to different markets.

There is more of a difference, if your Honor please, between plain cellophane and M. S. T. cellophane, a tangle type used for popcorn, than there is between M. S. T. cellophane and lacquered glassine, and yet where it suits their purposes in the cellophane area they lump all these categories together so it is one product; although, as between the different cellophane items there are differences in quality, there are differences in price and there are differences in terms of consumer acceptance, all of the tests they urge on you for excluding glassine and waxpaper.

They holler about protectiveness and yet they quickly bring plain cellophane in when it has not any moistureproof protectiveness. They holler about transparency when more cellophane is sold that is not transparent and is made by du Pont, and a substantial amount is sold in the market which is made opaque by various kinds of overprints. It is a theoretical approach that does not withstand analysis.

10326 I think it is also interesting, your Honor, to see that the definition which they use is one designed to carve out cellophane from all of the other materials by emphasizing those areas where du Pont's research has been successful.

They talk about protection. That protection was the result of du Pont research on the moistureproofing and development of proper protective films. They talk about its versatility. That is the result again of enormous research as to which we have had many witnesses testify; and they talk about the fact that its costs are lower and that too is the result of enormous research. The evidence shows that in all of those areas the impetus for the research and the impetus for the result was to compete, and then we come along with a product which has been improved, which is versatile, which is an effective competitor and those very results from research are selected out to identify this product as being something different than the products with which it competes. Not only is that an attack on research—of course, they say they

are not attacking research—but it is unrealistic in terms of the market situation. That is so much for trying to carve out this market by physical properties. You can't carve out the market by physical properties. You have to look at the market and see what happens.

To us at the defense table the most extraordinary thing
10327 about Mr. Renninger's presentation was his failure ever to refer to the issue of market control and market power, and yet that is the cardinal issue in this case. We had it opened up to us by the Government in the complaint in paragraphs 22 and 23, and we had it opened up to us by the Government at the very opening of the trial. Mr. Minicus said:

"The problem of market control perforce necessitates resolution of a variety of economic conditions attendant upon the industry, the character and nature of the market place and its participants must be ascertained."

And he said elsewhere in the same opening: "This economic analysis of the position of the defendant in its particular market setting is the key to measuring the degree of the control"

He said in another connection in the opening:

"It is not too much to say that current interpretation of Section 2 presents the central issue of doctrine in the entire field of anti-trust laws, the concept market control."

Well, what is all this proof about other materials *about* if it is not directed to the issue of market control? It is proof brought forward which refutes the assertions made on the opening and the charges in the complaint that we have power because we make cellophane to fix arbitrarily prices, that we have power to
10328 control supplies, that we have power to exclude others and we have power to restrain free and open competition at the distribution level.

The very facts in the market place which have been presented to all as proof go to that issue of power, and if the power isn't present there is no monopoly. Here we come forward with this ultimate presentation by the Government of their position and they don't say a word about. It makes no difference whether cellophane is a transparent, low-cost, protective material, or what you will, if it is sold in a market place under conditions when none of the monopoly powers which are charged can possibly exist.

Now, let us take a look at two or three of them for a minute against this proof. What about the power to control quality? The proof shows that these customers are large, strong customers, with laboratories of their own who are constantly testing and changing and watching for qualities in these various competing packaging materials.

The proof shows that there has been a constant research competition between the various suppliers of materials to meet particular packaging needs, and the proof clearly shows that if that quality were to be diluted or deteriorated by du Pont in its manufacture of cellophane other materials would get the business.

Du Pont hasn't the power to stop research competition,
10329 to stop putting technology into improvement of its product,
it can't dilute and deteriorate its product and compete in these markets, and it hasn't the power to control the quality that is contended for.

Let us talk about price for a minute. It is perfectly clear from the evidence that cellophane falls, pricewise, midway between this group of materials, but you can't look at price alone without looking at what you are paying for, and the proof shows repeatedly through these depositions that price is one of the factors considered in relation to the composite of properties that the particular materials offer.

Thus it is that the glassine people, as the Government's evidence showed Friday, constantly say, we give you more transparency per area covered than does cellophane considering the cost.

It is clear on the evidence that if du Pont raises the price of cellophane it will lose business. The low margins of profit in the bakery field and in the candy field and elsewhere will result in those wraps going off the packages in favor of other materials.

It even shows that where the price of the raw materials of the packages changes and the margin of profit diminishes, that the price of cellophane can exclude it from some markets.

10330 There is no showing at all that the reductions of prices
didn't broaden the markets as they did, and the evidence is clear that price increases would diminish the markets. There isn't a monopoly power here to move the price around to suit du Pont's particular purposes of profits, and the importance of the relationship between the prices of cellophane and these other materials is shown throughout the evidence.

Then, let us go to quantity. Where is the power to control the quantity or the supply, as the Government likes to call it?

The evidence shows Sylvania is expanding, the evidence shows that Olin is expanding, and the evidence shows that the purchasers of these materials have alternatives. And the evidence shows in this period since the war of constant shifts in the supply position. Du Pont over-supplied in some cases and under-supplied in others, even in that short period.

So those powers haven't been shown, and when we get down to the power to restrain free and open competition at the distribu-

tion level, which is the final power that they charge, we have a situation where the evidence shows that no converters are bound to buy from du Pont, they all handle other materials; we have evidence that Olin and Viscose have plenty of converters, have no difficulty getting the converters. There is a concession we
10331 don't control their prices, and what is there to show that we have any power over the distribution outlets?

You heard Mr. Martin's testimony. Did he give you the impression of some man that we were in a position to twist around our thumbs as we chose?

So, they have jumped away from their fundamental position on the opening. They are not in a position to prove market control, and they are forced back to a very technical position of a structural character in which they say every product is different, *every product is different.* No matter where it competes you can't ignore it. You don't have to show power. All you have to do is find a percentage.

I am confident that when they get down to that, which is their strawberry ice cream theory, we can convince your Honor that that would represent the most novel and far-reaching departure in the enforcement of the monopoly provisions of the Sherman Act that has ever been suggested in an equity court, and their case is right down to that simple fact, which is the only fact they have established, that of 75 per cent of the product that they arbitrarily select.

I would like to deal with a few of these documents specifically before completing these comments.

First of all, this pains me very much, your Honor. I don't like to be in the position of commenting on these documents that
10331 I don't believe will be admitted or should be admitted.

I would like to deal with Mr. Replogle's affidavit, which is Exhibit 504 on page 8073. If this does come in evidence, it comes in evidence in its entirety. You read a page that related to white bread. There is much other material in the exhibit. For example, on page 8077 Mr. Replogle states:

"Sylvania passed on to its customers the benefit of all price reductions in so far as unfilled orders were concerned, but no price reductions could be anticipated by the sales force of Sylvania inasmuch as all price reductions were initiated by Sylvania's competitor and no advance information or even intimation was ever had as to the competitor's price reduction."

That is what Mr. Replogle said. On the stand he said he talked to Mr. Hatt when he wanted to know something. The Government says those talks were all about prices and now they introduce an affidavit in which he says they didn't have an intimation of price changes.

Then we get to another aspect of the case, this so-called monopolization of converter outlets, which we have had so much about in the case. What does Mr. Replogle say about that? At 8079 he says, "Less than 20 per cent of Sylvania's cellophane production was sold to converters."

He says, "During that period there was a steady
10333 stream of printers and bag manufacturers calling on Sylvania with the idea of getting into the conversion of cellophane if sufficient product were available."

And later, on the same page, he talks about the converters at length, on this page. He says: "In the beginning of the base period there were only about ten or twelve recognized converters of cellophane. By the end of 1939 Sylvania alone was selling to 26 converters."

This gentleman, whose affidavit they offer, says that he was bombarded with requests from people who wanted to be converters and he had to push them off and he constantly expanded his converter outlets, and yet the statement is made repeatedly in this case to your Honor that du Pont corralled all the converters and stifled this company.

And finally, on the issue of expansion, it is stated at the top of page 8075 that Sylvania increased tremendously its productive capacity in order to keep abreast of the demand for its product to the extent of its financial resources, precisely the same testimony that was offered by Mr. Reichel.

Then I would like to turn to Exhibit 6002, which is the presentation that du Pont made to the N. P. A. in an effort to get raw materials. Although a great deal of attention was paid to the other pages of this exhibit, there was an ignoring of page 8115 of this exhibit 6002:

"Flexible packaging materials," the exhibit states,
10334 "including waxpaper, glassine, parchment, foil, plastic films and cellophane have become most important in food distribution and an economic part of self-service itself."

You can't read the pages that follow and try to distor' them into a statement by du Pont that nothing competes with cellophane and that du Pont is always ignoring the competition of waxpaper and glassine when there is a statement like that on page 8115 that was skipped over.

Now, I want to refer to Mr. Yerkes' letter at 6031 and to comment generally on the presentation made by that. I haven't continued, your Honor, to object to these documents in view of your Honor's ruling on the Thin Film Report, but it will be apparent to your Honor that the Government did not desire to confront Mr. Yerkes, when he was on the stand, with this letter which he

discusses in 1939, the position of Goodyear's pliofilm, 1939. And this was broadly presented as an indication that Mr. Yerkes did not feel that he had any competition from these various materials. But there are other documents in this case. Your Honor will have to look at all of them.

In 1931 we find a letter from Mr. Yerkes in Defendant's Exhibit 309 expressing strong concern about the glassine competition. What about this pliofilm that Mr. Yerkes didn't think was very important in 1939? What does the evidence show about?

10335 Great emphasis is put in these documents on it. Practically all of them from 6031 on talk about the inadequacies of pliofilm and not one of them is dated subsequent to 1949.

Many of them are written in the period when pliofilm is getting started, after the war period.

What does the evidence show? Mr. Elles of Goodyear, the only manufacturer of pliofilm in the United States, your Honor, testified, and he testified that in 1950 a substantial improvement in pliofilm took place as a result of which they made inroads of a substantial character in the fresh meat business, and his testimony coincides exactly with that of Mr. Smith about such competition.

We have no occasion to apologize because of the dynamics of this business that a new material isn't in a position to compete in 1947 or 1939, as this document says, but that research and development is in a position and takes business away by 1950 and 1951. And when you read from Elles' deposition you will see graphically shown the very kind of competition which I always understood the Sherman Act was supposed to promote and which we say exists.

What about this polythene? They have a number of documents on that. They read you one in 1948 in which Mr. Hunter of du Pont says to another du Pont man that printing will probably be the principal stumbling block for polythene. If you read

10336 Mr. Southwick's deposition you will see that deficiency in polythene was cured, Defendant's exhibit 1008.

If you look at page 8166 of a letter exhibit you will see in the paragraph that Mr. Renninger skipped when he read that exhibit relating to polythene, that our people in 1949 recognized this was going to happen and said, "We believe that many of the deficiencies of polythene can be corrected through research including transparency, surface slip, static, heat and glue sealing." That is what the other evidence in the case shows took place.

What you are going to have to do, your Honor, and it is a very hard and difficult task, is to take these various documents and relate them to the totality of the proof about what was taking place in the market at the time. No single document can tell the

story. Here are two or three which indicate that some people in du Pont felt some of these films were not going to be very effective competitors.

The statement is made to your Honor that there is no evidence in the case that anybody in du Pont felt that there was competition in these films or with waxpaper and glassine, and yet your Honor will recall that we put in literally whole volumes of exhibits on our case showing the day to day awareness by the people in the market of this competition and their comments concerning the competition.

10337 Finally, I would like to discuss this question of the market potential, which is the subject matter of a number of these exhibits.

If your Honor will turn to 8056, I think I can, of Exhibit 6018, dispel one misconception under which Mr. Renninger and his associates are laboring.

They said to your Honor on Friday and again today that these were all studies of thin film potential and that they exclude any consideration of waxpaper and glassine and that they showed du Pont was conscious of a transparent film market as something distinct from the flexible packaging market.

The discussion of transparent films in these documents is understandable when you recognize that that is all du Pont made. That is what they talked about, just as they talked about cellophane when that was the only packaging material they made in the earliest stages.

What did they do in determining the potential?

10338 If your Honor will look at the bottom of 8056 you will see the statement that "Realization of the cellophane potential would greatly reduce the position now held by Wax paper and glassine." And if you look at the earlier part of the document you will see that all of the sales of glassine, all of the sales of wax paper, all of the sales of these other materials were taken into account in computing the potential. If some cellophane was sold for a particular use or some polythene was sold for a particular use, then all of that use, whether it was covered by cellophane or some other material, was included within the potential for cellophane; and you see on the next page, 8057, a statistical clear reflection of that where the current transparent sheeting potential is laid out and what is included in it. Literally thousands and thousands of pounds and tons of foil, wax paper, glassine, and other materials which are being sold for the same end use as these films, but for purposes of duPont's planning and programming all are included within what they call "The Transparent Film Potential." But that is a potential to be realized only if wax paper, glassine and these other materials can be displaced.

So that when you study the potentials you will see that all that was happening was this: that the duPont organization was saying here we have a number of different films. Now we have to
10339 figure out how much to make, and we have to figure out how much we can sell. So we will take every place that any of them is sold, any particular use, and then we will project that entire use and assume that all of it goes to the materials we sell, and then we will sit back and see where do we best think in these uses polythene would fit, cellophane would fit, acetate would fit, as the potentials say, not in accordance with what the salesmen tell us but what we more or less guess, in order to plan what the sales are going to be. But they are all against the total potentiality of this flexible packaging market which is reflected, for example, on page 8057; and that is why in those earlier charts that I showed you where your Honor and I discussed the black and white bar you saw a long area of white bread unfilled which was held by these other materials.

The COURT. I think we will go to lunch now. Recess to two o'clock.

(At this point a recess was taken to two o'clock p. m., the same day.)

10340 TWO O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. GESELL. Your Honor, when we adjourned I was discussing the potential studies on which the Government relies. There is one other aspect of those studies which I want to mention. Your Honor may have noticed whereas back many weeks ago in the case the position from the Antitrust Division's table was that these materials do not compete in fact, the position that they are now driven to is that they compete only for fringe uses. There is no evidence of that in the case, and I thought I might point out to your Honor where the phrase comes from, because the phrase "fringe uses" is used in a different connection than that which it was represented by Mr. Renninger to mean, and that again comes from these potential studies.

If your Honor, for example, will look at exhibit 6018 at the top of page 8056 you will see one of these statements:

"It should be pointed out that these potentials are not considered overlapping. Some borderline competition may exist in certain end uses, but this has been reduced to a minimum by selecting for each film the markets in which it is believed it can best compete."

10341 Well, those references to borderline competition or elsewhere to fringe competition are references to the hypotheses on which the staff people making these estimates were proceeding.

There is a full explanation of that in exhibit 6017, the previous one, and again at the beginning of 6018. Arbitrary assumptions are made as to the particular end uses, where each of the films should be best and is best qualified, and then on that basis it is assumed that there is no overlapping or fringe competition in projecting those hypotheses bear no relation to the facts of the market, and I think that is where the Government table has gone astray.

In Exhibit 6019, for example, the statement appears at page 8072: "These assignments of film are not in accordance with field force reports of potentials in their trade reports."

In other words, he says we are ahead of the salesman in the field in setting up these potentials. In other words, they have not followed what the salesmen are telling them from the field.

Similarly in 6018, another one of these potentials, at page 8066, the statement appears—this is under "Cellulose Acetate Film":

"Sales in 1950, however, presented a different picture, with 48% of the packaging field due to the fact considerable CA was sold into packaging industries not recognized as Cellulose Acetate potential by the Technical Section."

In other words, there again in their projection they assumed that something else would be better in that end use, but then when they go back to look at what happened, the salesmen come in and say "We sold cellulose acetate for those uses."

So these are merely working papers used to project some estimate, and not any report of competitive market facts, and the references to fringe competition are there only because it was one of the functions of the report to eliminate overlapping in making those projections.

Finally, there is the issue that seemed to come up with respect to white bread that is referred to as a fringe use, though the testimony shows that we sell ten million pounds of cellophane for white bread, which if you are in the business of selling cellophane doesn't seem like a fringe use.

Then the stress is placed on exhibit 6037. Your Honor's attention was directed to the second page, but not to the first. At page 8161 the statement appears as to white bread:

"It must not be considered that white bread in cellophane is a new venture with which we are experimenting or a field which we hope to enter. We are already established in this field and have been, except for the war years, since 1934, at which time two of the major markets in the United States, Baltimore and Pittsburgh, were in cellophane practically one hundred percent."

Now, where again the mis-emphasis arises, I am sure inad-

vertently, is from the sentence at the end of the next paragraph which says:

"We have never, incidentally, directly promoted cellophane for white bread."

That means as a matter of direct sales effort, calling on the bakers. There was a simple explanation for that. In large part, your Honor, the bulk of the cellophane used for white bread is converted cellophane. It has to be printed, and that would be indirect promotion rather than direct promotion in the sense Mr. Brown uses the term.

Mr. MINICUS. There is only one other minor matter, your Honor. During the course of introducing our evidence we offered this duPont Technical Handbook and gave it an exhibit number, Government Exhibit No. 999. It has never been technically offered into evidence, and I now so move it. It is my understanding that if it is moved in evidence Mr. Gesell would like to have it impounded, and we are perfectly willing that the handbook should be impounded, too.

Mr. GESELL. May I see it a second?

Mr. MINICUS. Surely.

10344 Mr. GESELL. We do want it impounded. I am sure of that.

Was this given some exhibit number at the time?

Mr. MINICUS. 999 for identification. It came in during the defendant's case, and now we offer it as Government Exhibit 999.

(The duPont Technical Handbook referred to was received in evidence and marked "Government Exhibit No. 999.")

The COURT. Let GX 999 be impounded by the Clerk and not opened until further order of the Court.

Mr. MINICUS. With that, your Honor, the Government has concluded its rebuttal and rests its case.

The Government rested in rebuttal.

Mr. GESELL. Your Honor, with respect to the rebuttal you may recall that I raised the question earlier that I wanted to comment about one exhibit that related to rates of return in the event the Government counsel chose not to comment on those exhibits. That I would like to do now for a brief moment.

I will hand up, if I may, your Honor, a copy of the exhibit in question, which is GX No. 579. Your Honor may recall that I objected to that exhibit at the time on the ground that there was no authorship shown, no basis for giving credibility to the exhibit, and my objection was overruled. I want to comment on it in this way:

10345 I have prepared from that exhibit a comparison of the figures for pounds sold and dollar value for Sylvania as it

appears on that exhibit with the figures on which the Government asks your Honor to rely, which appear in two of its other exhibits, GX 541A, which is the official Government statement of dollar value of Sylvania's sales based on their own reports, and GX 411, which shows the pounds sold.

If I may, your Honor, I will hand up that comparison because it discloses a most significant fact. If you will start over at the right-hand column under the year 1936 you will see that the author of this anonymous document 579 showed pounds sold at 14,536,000, whereas the official Government exhibit shows that actually in that year it was 17,517,000. If you compare across the list on pounds sold you will see in 1937 a difference of about three million, a difference in 1938 of about three million, a difference in 1939 of about six million, and so forth across.

Similarly if you make the comparison on the basis of dollar value you will see equally shocking and substantial discrepancies.

The COURT. Directing your attention to the legend at the top of the document you have just been referring to——

Mr. GESELL. Yes.

The COURT. GX 541A and GX 411, what is the source of the material in those particular exhibits?

Mr. GESELL. Information obtained by the Government from Sylvania.

10346 What I want to point out, your Honor, is that the pounds sold and the dollar value figures that appear in 579 are the bases for all the calculations that appear at the bottom of the table from which comparisons are made with respect to rates of return and earnings per pound and so forth. So that if your pound and dollar value figures are so egregiously erroneous as these appear to be, the exhibit is not worth any weight. I simply wanted to underline that to your Honor.

The COURT. Do you wish to put in evidence this comparative sheet that you just handed me?

Mr. GESELL. If it would aid your Honor.

The COURT. If I look at the two exhibits I ought to have something to refresh my recollection.

Mr. GESELL. Why don't I offer that on my sur-rebuttal case, your Honor.

The COURT. All right.

10347 *Defendant's sur-rebuttal evidence*

Mr. GESELL. Your Honor, we have a very brief sur-rebuttal. I wish to offer first as Defendant's Exhibit 1022 a letter from F. W. Olin to Mr. Lammot duPont dated January 1, 1932.

(Letter from F. W. Olin to Lammot duPont dated January 1, 1932, was received in evidence and marked, "Defendant's Exhibit 1022.")

Perhaps I can offer all my exhibits. There are only four or five.

The COURT. Very well.

Mr. GESELL. I offer as Defendant's Exhibit 1023 Mr. Lammot duPont's reply to Mr. Olin dated January 7, 1932.

(Letter from Lammot duPont to F. W. Olin dated January 7, 1932, was received in evidence and marked, "Defendant's Exhibit No. 1023.")

I offer as Defendant's Exhibit 1024 a letter from Mr. Lammot duPont to Mr. F. W. Olin dated April 18, 1931.

(Letter from Lammot duPont to F. W. Olin dated April 18, 1931, was received in evidence and marked, "Defendant's Exhibit 1024.")

I offer as Defendant's Exhibit 1025 an internal duPont memorandum entitled "Cellophane Olin Industries" from
10348 Henry Ford to Mr. Gladding dated October 28, 1949.

(duPont Memorandum entitled "Cellophane Olin Industries" dated October 28, 1949, was received in evidence and marked, "Defendant's Exhibit No. 1025.")

Mr. GESELL. I offer Defendant's Exhibit 1026, the comparison between Government Exhibit 579 and two other government exhibits to which I referred a moment ago.

(Comparison of data for Sylvania 1936–1945 was received in evidence and marked, "Defendant's Exhibit 1026.")

Mr. MINICUS. May we have a moment to look over these?

Mr. GESELL. Certainly.

The COURT. May I direct your attention to Defendant's Exhibit 1025? Just for the benefit of my information, what is this business of Olin discussing or disclosing, I don't know what it is, to the Department of Justice?

Mr. GESELL. It is my understanding, your Honor, that based on Mr. Olsen's testimony, that before they took the license they discussed taking the license with the Department of Justice. DuPont had nothing to do with that whatsoever.

My interest in this document is primarily in the first sentence, which your Honor will note goes to the issue as to whether or not any funds of Equitable were used to advance Olin's cellophane venture.

10349 Mr. MINICUS. Your Honor, it raises a question and asks for an explanation. I think this matter has come up before, and I would like to make an explanation.

The COURT. I don't want any explanation. I just want information.

Mr. MINICUS. It is information pertaining to this.

The COURT. I was under the impression that the Department of Justice, in its Antitrust Division, never gave advisory opinions.

Mr. MINICUS. That is my understanding too, your Honor, with regard to this.

Mr. GESELL. We don't contend that there was any advisory opinion given.

The COURT. I just wanted to know what occurred, that is all.

Mr. GESELL. It did seem, in view of the showing, that we were careful to make sure Mr. Olin took none of this Equitable surplus and used it to finance the Olin venture.

Next, if your Honor Please, may I hand up a written statement, a copy of which I have given to Government counsel, pertaining to Mr. May, which was the subject matter of our discussion the other day in chambers, and I would like to have that included in the impounded records.

Mr. MINICUS. No objection to the inclusion of this.

(Written statement pertaining to Mr. May was received in evidence and marked, "Defendant's Exhibit 1027.")

10350 Mr. GESELL. Perhaps we could give it an exhibit number as a method of identifying it. That would make it Defendant's Exhibit 1027 impounded.

Colloquy

Now, if your Honor please, at the time we submitted our factual outline of our case we advised the Court that at the conclusion of the evidence we would annotate that outline for the convenience of the Court. That is the one in the blue folder.

I would like to hand up three copies of an annotated set of our factual outline, and if I might take just a moment I would like to indicate what we have done with it so that it may be of value to the Court.

We have taken the actual text of the prior document and simply placed underneath each provision a reference to the testimony of our witnesses that pertains to that particular subject. We have selected certain comments of counsel which we think are useful in stating our position, and, of course, which will enable your Honor, through the comments, to find the pertinent exhibits; and then occasionally we have cited a particular exhibit where we have thought that it was of special value and particularly mostly of a non-controversial character.

You will see, for instance, 76 on Page 52. We have gone ahead and cited what those exhibit numbers are in case your Honor would like to find readily the particular contracts.

10351 These references—and I want to underline this as

strongly as I can—are not complete. They are simply to be of aid to the Court at this stage of the proceedings.

There are two appendixes which I would like to mention. We have taken certain statistics and set them forth in Appendix A for ready reference, and in Appendix B your Honor will find a complete list of our witnesses arranged so as to show not only the date they appear and the book where their evidence is, but the pages where their testimony appears, and that, we thought, might be useful perhaps as an index to the testimonial part of the case.

Mr. McGlothlin points out we have made one change. I inadvertently spoke to your Honor incorrectly about this, in our factual outline, and that is at Page 59.

Your Honor may recall that after we got under way with our proof the Government filed a supplemental claim of the exclusion of two competitors, Armstrong and Schnier, in the cap and band business. So we did add two paragraphs on Page 59 which refer to Armstrong and Schnier on Page 59. This, of course, in no way, your Honor, represents proposed findings of fact, brief or anything of that sort. It is just a work aid put in at this time.

We are committed to your Honor to submit an additional brief which we will submit tomorrow on the evidentiary question
10352 which remains open with respect to the Reichel and *and* related affidavits, and we will have that brief in your Honor's hands and the Government's hands tomorrow.

Mr. MINICUS. With regard to that, your Honor, I was talking to Mr. Gesell. We aren't trying to quibble about this thing, just so the issue will be pointed out. We will answer their position, if I might have a few days beyond that to put it on memorandum.

I wonder if you would serve that in Washington. The people who are working on it will be in Washington.

Mr. GESELL. Surely.

Now I have, your Honor, a few brief housekeeping details which perhaps we can take up at this time. We have no further evidence. Our sur-rebuttal is concluded.

I would like simply to raise two or three brief points so we can close up this record with everything in order. I know your Honor wants to do that, and I don't want to delay it.

The COURT. I feel as if this is a moment in history.

Mr. GESELL. It is, indeed. We would like to work out some procedure for clearing out of your Honor's set those exhibits which were not received in evidence, if it is agreeable with Mr. Minicus.

Second, we would like to get back at this time the impounded documents which were not introduced in evidence. There are a number of such documents in possession of the clerk
10353 and we would like to get them back.

Third, we have a suggestion to make about corrections to

the record. It seems to me counsel on both sides will be working with the record over the summer, and that perhaps the best thing to do is, we would agree to submit sometime in September any errors that come to our attention in preparing our findings of fact and brief.

The COURT. What are you going to do about the stenographer's record and the printed record we have?

Mr. GESELL. We thought we would cite from the printed record.

The COURT. What about it, Mr. Minicus? It would certainly be a better working tool.

Mr. MINICUS. We only have one copy of it, your Honor.

Mr. GESELL. How many do you have of the other?

Mr. MINICUS. Three.

The COURT. I want to read my copy during the summer.

Mr. MINICUS. It will be very inconvenient for us. We have ordered three copies and with that we can get along. But with four or five people working with one copy between them, it would be extremely inconvenient to use it.

Mr. GESELL. The printed copy does show the ditto pagination, so working with your printed copy your Honor could find the other and we could give a reconciliation of the other by volumes.

10354 We would like to refer to the printed transcript as being the easiest to work with.

The COURT. I would want to read the printed record. It would be easier for me. This is off the record.

(A discussion was had off the record.)

Mr. GESELL. The only other remaining thing is, has a date been set for reply briefs, your Honor? I thought possibly we could work that out with your Honor before we all adjourned.

The COURT. No date has been fixed.

Mr. GESELL. I thought while we were together we could work that out.

The COURT. You will have between September 29th and October 14th to get in a reply brief.

Mr. MINICUS. Yes, sir. That is only about two weeks. We would like to have as much time as possible.

The COURT. See if you can get it in the hands of defense counsel the day before October 14th.

Mr. MINICUS. Thank you, sir.

Mr. GESELL. There is one other matter. Your Honor asked us to prepare for the Court an index which would show every page that each exhibit was mentioned at. We have that in hand and will get it typed up and have it to the Court promptly.

I would like to express our great appreciation to your

10355 Honor's courtesy in the scheduling of this trial and in all

the problems we have had. * * * It has been a most comfortable and pleasant thing from our point of view.

Mr. MINICUS. The Government is very happy that for once they can join with Mr. Gesell.

The COURT. The Court wants to say it is a great pleasure to do your job on the bench when you have such capable counsel before you.

Adjourn court until tomorrow morning.

(At this point court was adjourned.)

* * * * * *

10383 *Argument*

The COURT. You used the phrase a moment ago, the buyer's preference. Preference over what?

Mr. MINICUS. I say, a large group of buyers have a preference for cellophane in applications to which that product is adaptable. I mean by that, that there are a great many applications for which buyers prefer cellophane to a degree either that they will take none other or by taking some other must sacrifice certain elements of their desires.

The COURT. Some other what?

Mr. MINICUS. Some other product.

The COURT. What is the nature of the product?

Mr. MINICUS. We have heard a great many of them.

The COURT. I want to get your point.

Mr. MINICUS. Simply that there are undoubtedly many wrappers in the field today, wrappers of all sorts, many of which Mr. Gesell has introduced into evidence. There are the transparent films such as cellulose acetate, polyethylene, pliofilm, saran, and others, which are wrappers and which are transparent.

On the other hand, there are what has been referred to by us as the fibrous wrappers, mostly represented by glassine and wax paper. They are not transparent; they are translucent. They are a cheap product. But they are also a wrapper.

10384 Now, a manufacturer having a product to wrap has many considerations before he selects one of those wrappers. One may be the cost, another may be the wearability, another, and very often the case, is the transparency. He wants to show the product that he is selling. He wants it to be visibly apparent to the public on the shelves as they come in to buy. In addition, he may want reasonable cost. If he wants reasonable cost and adequate protection, cellophane is probably the product that he wants.

The COURT. Now, if he doesn't get cellophane, then does he stop there?

Mr. MINICUS. No, he does not stop there. There is no question about that. That has been thoroughly established at this trial. He has alternatives. He can pay more if he still insists upon absolute transparency, he can pay a great deal more and he can go to one of the colloidal films. And there he will get adequate transparency, he will get many of the other functions that you will find in cellophane. We do not believe he will get all of them. We think there are some functional disadvantages in the other colloidal films.

But his desires will be frustrated primarily in that market by the fact that he will have to pay a great deal more, thereby adding on to the value or the cost of his products. Or he may decide to dispense with absolute transparency.

Now, right off the bat, there we run into another frustration of desire. But it has happened. A person unable to
10385 get cellophane, wanting transparency, will go to one of the translucent products and get some transparency but not to the degree that he would have had in cellophane.

We also feel, however, that there are other factors, and we think the evidence has established that very clearly, that cellophane possesses. Whether you call it eye appeal or selling value, or whatever you call it, there is something inherent in cellophane that we do not think the evidence shows the other wrappers have. It is an ability to sell the product. There has always been something about cellophane—the duPont Company has advertised this fact repeatedly—that it promotes impulse buying——

The COURT. Then why does it have only some 20-odd per cent of the packaging industry if that is so?

Mr. MINICUS. Well, I think the evidence again has disclosed, Your Honor, that there are many reasons for that. Very often there are products—for example, take the case of white bread, which was testified to on the stand. There are some people who feel that white bread, because it is difficult to get an even baking, an even coloration to it, is not best adapted to a cellophane wrap. Therefore, they go in largely for wax papers.

On the other hand, we have the specialty breads that ordinarily are rather nice looking products, the baker wants to show them on the shelf, and he gets the most transparent wrapper he can possibly get.

10386 And of course, we believe that in this other 80 per cent we have interior wraps, inside the package, where they don't show at all, and transparency would be wasted. On the other hand, there are people who do use a transparent wrapper inside.

But the wrapping field is so large, there are so many things that are wrapped, large cuts of meats, and this was testified here,

apples, potatoes, and other things, that it would just be silly to put them in anything like cellophane.

Then there is a different group of buyers. There is the buyer who does not believe all this is true, the buyer who does not think that cellophane has the sales appeal to warrant the additional cost. He is entitled to his opinion, but he is a different type of buyer than that buyer who is in the market looking for cellophane.

The COURT. That is the point that I was after. In other words, according to your argument, there is a special characteristic to cellophane which appeals to a special class, is that right?

Mr. MINICUS. That is correct, sir. I don't want to be taken to say that that class is fixed either, your Honor. It varies with time—a special class at a particular time, the members of which may move in and out at different times, but at any specific time in the marketplace there are buyers who have a preference for cellophane.

The COURT. Well, if they move in and out, as you say,
10387 doesn't that mean if cellophane is then in competition with some other product?

Mr. MINICUS. I do not think so, your Honor. I think the competition has got to be looked at, at the thing of a particular instant when the dealers are in the market dealing. What happens six months from now, I do not think bears upon the competition that is going on at the particular moment in the market. People are always entitled to transfer their desires at some subsequent time. But I think a picture of a market is an instantaneous thing, where buyers are presently bidding and quoting and offering, and I don't think you can kaleidoscope a market into a six-month period. I think competition exists at the particular moment that the people are there bidding, and as long as there always is a group of particular people who have a desire for cellophane and are bidding for that cellophane, I think it is in a market by itself.

The COURT. So that which is it, there is monopoly according to your thesis, or monopoly power according to your thesis at all times, or only sporadic?

Mr. MINICUS. The monopoly power is there at all times, Your Honor, because there always is in the marketplace a particular group of people who have a desire for that particular product.

The COURT. I have it. You say the percentage of that buying element may vary, but it is there at all times?

10388 Mr. MINICUS. I think the evidence pretty clearly indicates that it has been increasing right from the beginning. It has always grown larger.

The COURT. Do you think it would be a good practice that after you have talked for an hour we just have a five-minute recess?

Mr. MINICUS. Thank you, sir.

(At this point a brief recess was taken.)

* * * * * *

10431 Mr. MINICUS. Then if we can relate Judge Knox's analysis—not the Government's, but that expressed by Judge Knox—to the facts of the case at bar, the defendant's expenses for cellophane technical activities has total in excess of $24 million during the period 1924 through 1950. Annual amounts expended for research and technical development by duPont currently approach $3 million. In addition to these enormous expenditures for the sake of entrenched position, the defendant's power to exclude is buttressed by other strategic advantages in technology. These factors include: The vast amount of technical skills gathered together within a single company during the past quarter of a century, maintainence of an array of inventive talent, highly specialized patenting methods and personnel, and research.

Now, I want to stop there for a moment and make it quite clear that this is not an attack on research or the amount spent for research. I know we are going to hear later that that is
10432 what we have done, but that is not what we have done.

This, Your Honor, is an exposition of economic power. This is part of the monopoly. This is one of the places in which the seeds of the monopoly, past, present and future, are to be found, and that is what we are talking about at this point of our discussion and of the discussion of the evidence. We are speaking here of power and there is one of the elements of power.

The COURT. Well, you can't have your cake and eat it, too. Should American industry dispense with research?

Mr. MINICUS. I don't think it follows from that, Your Honor, that research would be discontinued if the power of some of these companies was diminished. In other words——

The COURT. I want to follow your logic. Assuming that Company No. 1 has indicia of power A, B, C, D and E, and F is research, should F be cut out?

Mr. MINICUS. No, I am not talking about relief now.

The COURT. When is research then acceptable to your thesis?

Mr. MINICUS. Research is always acceptable to our thesis, Your Honor, and as I said, we found nothing wrong with it here, but here it is also probative of the power of this defendant.

The COURT. My difficulty is this, Mr. Minicus. You say, "We are not criticizing research as such, but that is an indicia of economic power." Now, it cannot be both, can it, or can it? I don't know. It just troubles me.

10433 Mr. MINICUS. I think Your Honor started with the question, are we to leave out research for the sake of liquidating

monopoly? My answer then was that I do not believe it is necessary—I don't think it necessarily follows that if the economic power of some of these large organizations is diminished, and an active competition moves into the market, that research will stop. Certainly that has not been the case in the automobile industry which has been reasonably competitive since its inception. But when we are appraising monopoly power as such and we are attempting to ascertain what the strength of the corporation under attack is, vis-a-vis the strength of the remaining competition, it is necessary to look to the respective abilities they may have to compete through research facilities.

The COURT. That means then that if you indulge in research you do it at your own risk. What is your definition, to go back to an allusion of one of your cases, of what is good and bad research?

Mr. MINICUS. I do not believe, Your Honor, that there is any bad research, but when research is one of the elements, one of the constituents of the power of a monopolist and we are faced with a situation where the curing of this situation is to be brought about, we have to consider their research facilities, too. In other words, we have one of two alternatives. We do that and we look to the research and we say that the research is one of the things
10434 that gives this company its power and it is one of the reasons why other corporations in the same field have difficulty of fail completely in competing with them. Now, we have that, and it is good research.

The COURT. But Mr. Minicus——

Mr. MINICUS. May I have the other side of my dilemma, please?

The COURT. Yes.

Mr. MINICUS. That is all very good. But the point is, are we to bow down to that and say, "All right, we are licked, let's knock out the Sherman Act." We have got to have one of the two. It is a balancing of the equity, it seems to me, Your Honor. If we are to admit the concentrations of research are to be encouraged to this degree—I don't say to be discouraged—but to be encouraged to this degree, then we have to say, "Well, the Sherman Act is all wet and we'll get it off the books."

The COURT. Then my next question is going to put you to the acid test. If you get a decree in your favor, shall I issue an injunction that the duPont Company must abolish its research facilities?

Mr. MINICUS. I certainly shall never ask for such a finding and I don't think anybody in the Department of Justice will.

The COURT. Well, what happens to your argument then?
10435 Mr. MINICUS. I feel, Your Honor—of course, this is getting us into the realm of relief——

The COURT. No, you are not arguing on relief now; you are arguing indicia or evidentiary factors of illegal monopoly. That is what you are arguing, you understand.

Mr. MINICUS. If you will excuse me, you asked what I would ask for in the way of relief.

The COURT. All right. If you want to criticize my question, go ahead.

Mr. MINICUS. I am not doing so, but it does bring us over there and I am perfectly willing to meet it. I said, I don't think anybody in the Department of Justice would ask for that.

The COURT. How can you condemn it on one breath and do nothing about it in the other?

Mr. MINICUS. We are not condemning it. We say if you reduce the economic power of the defendant so that the others in the industry will be built up and newcomers will come into the industry, they, too, will have a chance to build up research facilities commensurate with those of the defendant.

The COURT. But in the meantime then a particular defendant keeps his research facilities?

Mr. MINICUS. Oh, yes. In other words, that the research will grow from within in the remainder of the industry if it is
10436 encouraged by some of the liquidation of the concentration of power that is under attack. But at this stage, where we are discussing the liability rather than the relief, the research is here only pointed up as one of the constituents of the power, and it has been considered so by Judge Knox and also in the G. E. case before Judge Forman.

The COURT. I know Judge Forman wrote at length on that phase of the case.

Mr. MINICUS. It is a factor, I believe, Your Honor, in the liability, but I don't think it is something that is subject of attack on the relief, from that point of view—that is, research facilities as such and the research effort going on within, I don't believe anybody wants to knock that down—at least I have never heard of such a case, but we do believe that a diminution of the power of the company under attack and the consequent building up of others will tend to effect more equitable research facilities.

The COURT. You see, what I am trying to do, Mr. Minicus, is follow you on facet A, B, and C of this power question, and that is the only reason I make the inquiry.

Mr. MINICUS. True, and I have done the best that I am capable of in explaining our position, sir.

The COURT. Very well.

* * * * * *

10439 We believe that the contents by the defendant regarding exclusion of specific potential competitiors are equally

specious. The defense in this instance is a general one, that the potential competitors, which have been identified in the evidence, never possessed an intention to engage in the manufacture of the products involved. Considering that, in most instances, each of these companies, these potential competitors, was obligated to the powerful duPont organization not to compete in the manufacture and sale of these products, it is not surprising that the desire to compete never developed; nor is the absence of such intent justification, after the fact, for a covenant or understanding not to compete, when such covenant or understanding is not ancillary to the sale of a business.

The COURT. Well, what am I going to do with the testimony from the stand, the live witnesses, who said they weren't interested to compete? Do I ignore that?

Mr. MINICUS. That is my point entirely. They did not say whether their lack of interest developed before they had made these covenants not to compete or afterwards, Your Honor. If they were bound by a contract—and some of these contracts go back a great many years—never to engage in the cellophane industry, it is rather easy to understand why their interest never developed.

The COURT. But non constat they were explaining why they entered into contracts. They were willing to be bound
10440 by such provisions as excluded them because they were not interested.

Mr. MINICUS. That is very true, Your Honor—even if we assume that their lack of interest was present and contemporaneous with the signing of the contract, but does that relieve it any less of being a restraint of trade if through the years because of that there is a bar to the development of the interest?

The COURT. Well, it seems to me you are predicating this present argument on the legal effect of the contracts themselves in contradistinction as to the testimony of the witnesses. You may be right. I don't know.

Mr. MINICUS. That is exactly my point.

The COURT. I just wanted to clarify your position for my own benefit.

* * * * *

10525 JANUARY 7, 1953, 10:00 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. May it please the Court, as we come to these last arguments in the case my associates and I have tried to think what we could do to be of aid to the Court in resolving the issues that are before the Court. The case has been fully briefed; we have argued many issues as we have gone along, sometimes more than once; there are detailed findings of fact; and, of course, in a

case of this magnitude it is impossible to cover, even in the liberal time your Honor has allowed, all of the fact issues and all of the law issues in the case. I am going to concentrate on what I think are the primary issues as they were brought into focus particularly by the arguments that we heard from the Government table the last two days, because I think though this process we have come nearer and nearer to some delineation of issues than we have been throughout the trial itself.

I would like to urge your Honor, if you will permit, that you interrupt me at any time with a question as to a fact or an issue or as to something you think I may have failed to touch on that you think is significant. I don't mind such interruptions; I welcome them. If your Honor has any questions I hope you will put them to me during the next two days.

10526 As your Honor is certainly aware by this time, duPont believes that the complaint should be dismissed; that no monopoly, conspiracy to monopolize, or attempt to monopolize has been shown on this record. What I am going to do on my argument is to break it into two main sections. In the first I want to deal with the principal issues of monopoly power and monopolization that on the evidence there has been a failure of proof on those crucial and I think definitive issues. Then—I won't reach this until tomorrow—I am going to devote considerable time to the plaintiff's proposed findings of fact. This is an argument on facts and conclusions of law. I think the proposed findings that the plaintiff has presented are so full of holes, so unsupported, that they deserve considerable detailed attention. I have chosen the findings for emphasis, your Honor, because we have been sort of proceeding here in ever expanding circles. The brief that was filed by the Anti-trust Division goes far beyond its findings and the argument yesterday goes far beyond the brief. They are both supposed to be based on the findings, and I propose to demolish those findings if I can, and if I do that the whole house of cards should fall.

I am not going to deal with all aspects of the case as they are covered in our brief, but only the main issues.

Now, by way of preliminary comment I would like to emphasize to your Honor again that we think this is a fact

10527 case and we are going to place the emphasis on the facts. We think the decisions may be readily applied once the facts are determined. It is our view that on the facts as they have been shown your Honor is being asked to undertake a substantial extension of the Anti-Trust Laws far beyond any decided case into wholly new areas of legal doctrine. If I can show that to your Honor by the facts, I am confident that the facts will not impel your Honor to go further than the decided decisions have gone.

Now, we are considering those facts in a court of equity. This is not supposed to be—though sometimes I think it was brought for that purpose,—a punitive proceeding. This is supposed to be a proceeding where your Honor as a court of equity will intervene only if some wrong exists here, some injury is threatened under this statute. We have an explicit concession on the record that there are no predatory practices to be enjoined, and we are dealing solely with size. We are dealing with whether or not duPont is too big, whether or not its position is too big; and before discussing that in its details I think we should not overlook the broad sweep of the evidence that we have had here and the facts that are by and large in this case wholly uncontested.

This complaint, filed in the enthusiasm that supported it before the facts of the business were known, charged that the Amer-
10528 ican public had been deprived of the benefit inherent in a system of free enterprise. That was the culminating allegation of the complaint and supposed to represent the Government's view of what this case is all about.

The COURT. May I inquire, you said a few moments ago there is no charge of predatory practices.

Mr. GESELL. I stated, your Honor, that the Government had conceded—and that is at transcript page 2313 to 2315,—that there are today no predatory practices. It is stated that it was beating a dead horse except for size, and that the only thing in this case was 75 per cent.

The COURT. Because there is a lot of talk in the brief about predatory practices.

Mr. GESELL. A great deal of talk. You will find none of those practices continuing today, existing today, being threatened today. In large part the discussion of those practices relates to a period more than twelve years ago, and I mentioned that simply to point out that while we say those various practices do not exist—and I will deal with them specifically—that your Honor is not here being asked to adjudicate a series of specific restraints and to determine whether or not this transaction or that transaction was or was not a restraint of trade. We are charged here only with monopoly, and as a court of equity your Honor looks to the future, not to the past. If our position today is free of practices that may be criticized under the act and does not constitute
10529 a position of monopoly as charged, then this complaint must be dismissed, because that is all that is before your Honor.

The COURT. Was that the view of the court in the Timken case?

Mr. GESELL. I believe so, your Honor. I believe that has been the view of every anti-trust equity judge.

Now, to be sure, the past has been examined to determine whether in the light of the past there is a threat of reoccurrence,

and if your Honor finds there is a threat of reoccurrence, of course you may intervene even though the practice is not continuing today. But given the termination of practices, particularly, I emphasize, your Honor, in a Section 2 case—this is not like the Timken case in that regard, of course—in a case that does not charge violations of Section 1 and is not concerned with an adjudication of specific alleged restraints, your only function is to determine whether or not this position that we heard so much about for two days is an illegal position standing as it does today, and of course in determining that you may determine whether or not it was acquired by legal or illegal means. I am not saying that. But whatever it is, whether it was acquired legally or illegally, if it is not a monopoly position then there is nothing that the Court need concern itself with in any decree or in any adjudication.

Let us take an obvious situation, your Honor, by way of illustration of this point. There is a charge here that in 1931 the prices of plain cellophane were fixed in the Argentine. Now, there is a great deal of evidence to show that they were not, but it is argued in the Government's findings that they were. Well, you Honor is not called upon to adjudicate whether or not in 1931 there was or was not price fixing of plain cellophane in the Argentine, and then whether that was or was not a violation of the Sherman Act. This case is directed solely to the present problem of whether or not monopoly exists.

The COURT. Let's look at Section 2 for a minute: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor." What does that mean?

Mr. GISELL. That means that if the action is brought in the criminal part, we may be convicted, but we are proceeding here——

The COURT. Under Section 4?

Mr. GISELL. Under Section 4 of the Clayton Act. This is an equity proceeding and you are not asked to adjudicate whether or not a misdemeanor has been committed on the civil side. This is a remedial action.

The COURT. Well, why do we bring Section 2 into the picture? I am trying to find its relevancy. To get relief under Section 4, isn't the Court required of necessity to see that there has been a violation of Section 2?

Mr. GISELL. Yes, but there must be a violation today, Your Honor.

The COURT. In order to bring in operation Section 4, which calls for current relief——

Mr. GISELL. Yes.

The COURT. Against current evil.

Mr. GESELL. Current evil, threatened evil. Is there
10532 a mischief which the Act is directed to which exists that must be stricken down? And it is not Your Honor's function to adjudicate every transaction and practice of the past. The reason I emphasized Section 2, Your Honor, was simply to point out that a great deal of the Government's argument and discussion is concerned with alleged Section 1 violations, which they say were the root of the so-called predatory practices by which we are supposed to have achieved a violation of Section 2. But if we are not in violation of Section 2 and no violation is present today, then it is not the concern of the Court whether or not in the past there was a particular transaction that did or did not violate Section 1.

Does that answer Your Honor's question?

The COURT. Yes.

Mr. GESELL. I was commenting by way of a preliminary remark that we have to look at all of the evidence in this case in the light of certain broad facts which I am not going to labor but simply cover briefly, and they are facts that pertain to the ultimate charge of this complaint, in Paragraph 44, I believe it is, that the American public has been deprived of the benefits of a system of free enterprise.

Briefly, Your Honor, there isn't and there hasn't been from the outset—in fact, many of these facts were established by Exhibit
1 introduced by the Government—any dispute as to certain
10533 very material and certain very significant facts. DuPont was the first person to enter this business in the United States in the early days of the chemical art. It had the vision—it took the risks—it was the first—there was no one else. Your Honor appreciates that the monopoly is supposed to have started there. And everything we did there was what a hundred per cent monopolist was doing, according to the Government's theory. But that one hundred per cent position was achieved because we brought to this country a new development.

What have been the facts briefly? There is not any dispute that the product is good. There is not any dispute that it is useful. Not a single person has appeared in this courtroom and complained of anything that duPont did during the entire development of this business. Not a customer complained, not a competitor complained, not a potential competitor complained, and the Government said they had no complaints. And the business has been profitable—a function of free enterprise. It has been profitable to the shareholders, and prices have gone down, as costs have gone down, and volume has increased and research has been energetic and fruitful and directed toward proper objec-

tives, and new jobs have been created, whole new products have been developed, and new uses have been found.

There are two other concerns now making this product in competition with duPont and many other manufacturers competing with duPont using other materials, as the Government
10534 now admits. And this competition is strong and persistent and a great deal of it was created by the advent of cellophane and its effort to compete as a new material in this highly active, growing energetic market that it is in.

There isn't any dead hand of monopoly here. There are no anti-competitive agreements among producers, no vertical and horizontal integration, no buying up of competitors, no shutting off of essential raw materials, no lack of technical progress, no dissatisfied and trampled competitors or customers, no jiggling of prices or price increases to squeeze out the less stable or the less financially strong institutions, no lack of energetic expansion, and the thrust of the Government's contentions yesterday—and I confess, Your Honor, I wondered what a stranger to this courtroom would have thought had he arrived here just yesterday—was that we were too powerful in research, that we had altogether too optimistic and definite plans to expand in the future, and that prices were going down. All I say is that everything that I am going to say in this argument from here on in is in the context, Your Honor, of those clear facts—a progressive, growing, dynamic industry, which is brought here by the Government.

Those question do not decide the case, and I do not say they do, and the Government tries to put them to one side by saying, "Oh, they are just saying they are a good monopoly." Well,
I have never said we were a good monopoly—we are
10535 not a monopoly, good or bad, and we never have been one.

But I point to those facts to indicate that many of the theories and the inferences and the arguments of the Government directed to restrictions, restraints, hampering, are all contrary to the end result—a growing, energetic, expanding business, conducted along the very lines that all of us certainly have thought the free enterprise system was supposed to encourage and the benefits that it was supposed to bring.

Now, we are at the forefront, Your Honor, of the Anti-Trust Division's ever-ceasing effort to expand its control. This is no ordinary case. We are not battling concrete facts because the Government constantly says that these facts that I have just recited are not challenged, and these facts I have discussed are the business; we are battling a theory, and we have been battling a theory in this case from the day we first walked into Your Honor's courtroom, and it is a theory directed to dominance.

We talked about 75 per cent for many months, and now 75 per cent is wrapped in a phrase, dominance. But what is it? It is an attack on bigness, it is an attack on size, it is an attack on success.

Now, with no act or practice to be enjoined, either existing or threatened, and with the admission of the Government that it is beating a dead horse except for 75 percent, what is Your Honor to do? We have litigated this case for months and
10536 the Government will not come out and say what it wants. It has not yet specified its relief. But Your Honor would not enjoin research. Your Honor would not enjoin expansion. Your Honor would not enjoin price reductions. You would not enjoin energetic selling. You would not place an artificial limit on our size, on our growth, on our position. The issue here is therefore a very simple one. Granting that research and expansion and price reductions and energetic selling should continue and are desirable, are not manifestations in themselves of any illegal power, that they are consistent with the kind of economy we want, Your Honor is asked to take a plant or maybe two plants of duPont, that it has obtained by these proper processes, and turn them over to men of less initiative, men of less vision, men who always like to try to pick up the crumbs off the tables that the Anti-Trust Division tries to brush.

Now, why should that be done? I say to Your Honor that that penalty, which is a severe one, with all that it implies as to theories of soft competition and the penalties it places on success is a very severe penalty and one that should not be imposed without the clearest and most definite showing, because this is not only a case about cellophane, if Your Honor please; this case, like any case in the forefront of Anti-Trust enforcement, sets patterns for future business conduct, not only by the defendant but by others, who read and watch the decisions. And there isn't any
10537 question that a decision against duPont in this case would have a terrific stifling effect upon its competitive initiative, and the bearing that such a decision would have on the course of the economy is far from clear.

I approach the issues in this case, therefore, Your Honor, more than any case that I have ever been in, with a feeling of very heavy responsibility, because if I cannot make your Honor see that what duPont did here was right and just under our system of laws and business in this country, I will have failed to get over to you something which seems to me so patently obvious that it should have forewarned the Anti-Trust Division long since against pushing this abortive prosecution.

So much by way of preliminary.

I do not know how to start in a case like this except to act as a lawyer. I cannot talk economic theory, I cannot discuss what should be done or what should not be done by the Congress or by economists, or someone else; I have got to stay within the judicial branch of the Government and as a member of the bar talk and act like a lawyer, and that is my starting point then.

I say to Your Honor that this is an explicit statute that has to be applied, that it carries criminal and civil sanctions, and that such a statute therefore can only be applied against a defendant, with all the presumptions that exist in the defendant's favor, when there is a clear showing that an evil exists and that is cannot
10538 be applied except on the basis of fact, and Your Honor cannot act in the realm of theory.

We are not attacking the Sherman Act; we say we are not under it. duPont has flourished under a system of free enterprise. We want you to apply this statute as it is written. We are not a monopoly, a good one, a bad one, or any other kind of monopoly, and we think the complaint must be dismissed.

The first fact that I want to talk about is a fact that we brushed over very lightly in the arguments of the Anti-Trust Division and that we brushed over very lightly in the Anti-Trust Division's brief, that we brushed over very lightly throughout the Government's case. It is an undisputed fact. It is a fact that I think in large part controls the outcome of this case. I refer to the fact that moisture-proof cellophane was a lawfully patented article.

Your Honor, this is the first case that has ever been brought under the Sherman Act where this issue is present, the first monopoly case. It distinguishes this case from all other cases. It makes the decision in this case much easier than in some of the other cases. It makes most of the facts and most of the decisions on which the Anti-Trust Division relies inapplicable here, and it makes our conduct in many respects where it has been criticized, lawful and proper under the constitution and the laws of the country.

10539 Now, I want your Honor to look, if you will, at Finding 91 of the Government which talks about the moistureproof patent and Finding 88 that precedes it on the same page 62. They are talking about the moistureproof patent, and these are the findings, your Honor, that the Government asks you to make. They say in 88: "It is true that the extremely broad claims of the Charch Product patent dominated all of the subsequently acquired moistureproof patents, and thus while these broad claims were safe in the hands of duPont, none of these other moistureproof patents were of any present offensive value."

Dropping down to 91, we come to the explicit statement which I wish to call your Honor's attention to:

"Claims 1 through 6 of this product patent were of such tremendous broad scope that they dominated and controlled the manufacture, sale, and use of all types of moistureproof cellophane."

That is a finding they ask you to make, and it is a finding, of course, with which we concur, that the claims of this product patent were of such tremendously broad scope that they dominated and controlled the manufacture, the sale, and the use of all types of moistureproof cellophane.

Now, coupled with that statement, your Honor, we have, of course, the claims of the patent itself which we previously
10540 brought to your Honor's attention. I will not read all of the six, but let us just take one, the fifth claim, which is one of these broad claims they talk about. Here is a patent which in its fifth claim, by way of example, claims this:

"A wrapping material comprising a sheet or film of regenerated cellulose combined with a moistureproofing composition, said article being transparent, flexible, and non-tacky."

So there is claimed in this patent moistureproof cellophane as a wrapping material, and they say that the claim I have read and the others that are next to it were of such tremendously broad scope that they dominated and controlled the manufacture, sale, and use of this product.

Let us take the second step and the second undisputed fact. They concede that this patent was valid, so that issue is not before your Honor. So we have in this case a patent which dominated the manufacture, sale, and use of the product we are claimed to have monopolized and which is admittedly valid. Now, I say to your Honor that situation has never before existed in a monopoly anti-trust suit, and this patent, if your Honor please, was in effect from 1929 to 1946 and its companion process patents until 1948 after this litigation had been brought.

When this case started we pled this patent as a defense.
10541 I presented it to your Honor at the opening. We consistently put it before your Honor as one of the controlling facts in the case. It was invented by duPont, developed by duPont, and there is no question that duPont's ownership of the patent was lawful. With that patent validly present no one could import without a license, no one could sell here without a license, no one could make without a license; and we are talking about moistureproof cellophane which they refer to in their brief as the entire industry, as of course it is, because it constitutes more than 85 per cent of the total cellophane business.

Now, you could stop right there, your Honor. How can we have monopolized a patented product of our own invention and control where the patent was admittedly valid? No court has ever said that that was a monopoly before. To do so would be to overlook the constitutional provisions themselves and the numerous cases which we referred to at page 76 of our brief, including the Aluminum case. All recognize that where a valid product patent exists the claim cannot be made of monopoly under Section 2.

Now I am going to come back to an aspect of this, but I want to mention it briefly now. I am going to discuss it more later. Your Honor understands that during the period 1929 to 1946 our prices, our research, our distribution, and our production were all in the direction of exploiting this patent. We were
10542 building more plants to produce our patented article. We were trying to distribute it effectively in competition. Our research was designed—and this was not even challenged when the witness testified—to promote and develop that art; and our prices were designed to sell the goods; and I simply call your Honor's attention in passing at this moment—I am going to come back to it more—that those price, research, distribution, capacity and production activities which were all to promote the progress of the science in the useful arts under this broad dominating valid patent are the practices that they condemn and attack as being evidence of illegal monopoly power; and that cannot be so.

Now, I have tried by reading the briefs of the Government to find out what their answer is to this argument, and they have, your Honor, in their brief only two answers. One, they say it did not cover plain cellophane. Well, of course, that is no answer because this business is built and founded on moistureproof cellophane. No one makes plain cellophane who does not make moistureproof cellophane. Moistureproof cellophane is 85 per cent or more of the business, and the practices that they are attacking and condemning are all practices relating to moistureproof cellophane as far as they have any current consequence whatsoever.

Then their next argument is—and this is the only other argument that I read, other than snide attacks on the patent, which
10543 they can't make, having admitted its coverage and its validity—is that the patent was abused, and they say that by reason of the moistureproof license to Sylvania we abused that patent, and because we abused it we are not entitled to its protection under the law.

So while I am concerned with this patent matter I want to take up now the question of whether we did or did not abuse the patent, and I say we did not abuse the patent, and I want to take up specifically and concretely each of the claims which the Government makes in support of its assertion that the patent was abused.

In the first place—and I confess this is one that I do not fully understand—they say that we by asserting this patent against Sylvania imposed on it a royalty burden that stifled their growth. Well, since it is acknowledged that Sylvania was infringing and since the patent was valid and since they could not have made a pound of cellophane without rights under the patent, what is there in the charging of a royalty which can be said to be a misuse or abuse of the patent? But if there is any question about it, your Honor, Mr. Reichel testified that the royalty, which amounted to less than one cent a pound, was no obstacle to Sylvania.

Now, it is said that we got by this royalty commercial information of an insidious or improper kind. Well, it was a royalty based on percentage of their sales, and so when they paid the royalty we knew what their sales were, and that is all there is to that; and that happens every day in this country everywhere, and the files of this court are full of royalty license agreements under which payment is made on a percentage of sales, and therefore anybody with an eighth grade education can make the necessary computation to find out what the sales are. So I say there is nothing to the royalty argument.

10544

Now, the next argument that they make is that we forced an acknowledgment of the validity of the patent. Well, that again is difficult for me to see how that is an abuse, particularly when the Government in this case admits the validity of the patent.

The COURT. Isn't the rule of law that every licensee must admit validity?

Mr. GESELL. Yes, and it has never been held to be improper, your Honor, and certainly in a litigated case, in a case that settles an actual litigation brought in court, the acknowledgment of validity is boiler plate in patent license agreement.

They say, your Honor, there are two other reasons, and these are the ones we will deal with at some length; one is that it created an illegal patent pool and the other is that the agreement imposed a quota.

Now, if you will turn for a moment to our finding 545, your Honor, which appears at page 369, we have there set forth in precise terms the provisions of the agreement itself, and as this argument proceeds reference to the provisions of that agreement may be helpful.

10545

We are concerned with what the agreement provides because the testimony is undisputed that it was carried out in accordance with its terms, and this illegal pool or illegal grant back that they are talking about which arose, as the testimony of Mr. Yerkes and Mr. Carpenter and others makes clear, from a settlement of a bona fide litigated controversy must be determined by reading the agreement. In the first place, your Honor, this agreement was a one-

way grant. At the time this agreement was entered into, if the Court please, Sylvania did not have a single moistureproof patent. The only moistureproof patents belong to duPont, and duPont granted a one-way license to Sylvania. Without that license Sylvania could not have lawfully manufactured. The mere granting of the license, of course, diluted duPont's position which up to that time was 100 percent in moistureproof cellophane, and of course Sylvania throughout the life of the agreement used the patents and had to use the patents that were licensed. So as the agreement itself recited, your Honor, Sylvania represented that it had no patents, and what occurred at the outset of this agreement was a one-way patent grant.

10546 Now, there were provisions as to the future, and these are the provisions which the Government relies on for its claim that there was a patent pool. Future patents were to be licensed, but under extremely narrow and carefully circumscribed conditions. In the first place, the patent must relate to moistureproof cellophane. The agreement did not go beyond the scope of the basic product patent initially licensed. In the second place, a license had to be requested and taken within a three-months period, and there were special royalty provisions for major developments.

But this is even more important, your Honor. There was no obligation on Sylvania to grant any license back after the basic patents expired. The obligation of Sylvania to grant back lasted only so long as the basic product patent was in effect, the product which their finding 91 concedes dominated and controlled the manufacture, sale, and use of this article. And when the basic patent expired, your Honor, the licenses expired except only if they were at the time of expiration in actual commercial use. So here was an agreement confined carefully and precisely to the scope and the life of the broad product patent. No executory provisions after that patent expired, no licenses after that patent expired, except where they actually were in commercial use at the time.

Let us look at what was not in the agreement for a moment, your Honor. There were no royalties payable except
10547 on production under the licensed inventions. There was no price provision. There was no territorial provision. Sylvania was free to export anywhere it wanted. This is significant, your Honor: There was no limitation on the amount that any party could make under its own patents. There was no exchange of applications. There were no provisions for know-how and technology. Hundreds of patents in this art were not covered by the agreement at all, and duPont got no right to license Sylvania's patents.

Now, I say to the Court that on such an agreement there is no decision which says that that is an illegal patent pool condemned under the Sherman Act, and there are explicit decisions of the Supreme Court which say it is lawful. As your Honor himself has recognized in the Vehicular case, patent pools per se are not condemned, and here was a license arrangement, your Honor, which involved no bringing together by two manufacturers of competing process patents for the purpose of creating a stronger structure to dominate an industry. None of the patents licensed by Sylvania under this agreement—and there were about nine—could be practiced at all without a license under the basic duPont patent which dominated this product. They were not of any consequence of themselves at all.

10548 This is not a case then such as came within the Cracking Case doctrine of bringing together and combining from two dominant producers competing processes for the purpose of imposing regimentation upon a business. This is not like the Lime Material Case or the G. E. Case, or the Carboloy Case. Your Honor will have noted at page 59 of the Government's brief that they rely primarily on this Carboloy Case. And it is very interesting to note that having carefully set forth language that suits them from that case, they omitted the two significant sentences that follow immediately after their language, in which the court said that the monopolistic price-fixing scheme in which the parties were engaged was illegal and it didn't make any difference what the relation was between the patents that they accumulated. Of course, that sentence changes the whole meaning of their quotation and makes the case consistent with the law and doesn't bring the case within this agreement which was a narrow, specific agreement involving the grant of a valid dominant product patent.

I said to Your Honor that the validity of such an agreement had been recognized by the Supreme Court, and that is the case. The controlling decision on this, Your Honor, is the Transparent-Wrap Machine Corporation v. Stokes & Smith case in 329 U. S. And Your Honor will recall that at page 118, I believe it is, of our brief, we set forth on two pages there the very significant

10549 language of Judge Hand in dealing with the Transparent-Wrap case on remand from the Supreme Court, and we say that this decision establishes without question the validity of this contract and it shows that the patent was not, as the Government contends, abused. I would like to take a moment to trace that through, if I may.

The Supreme Court said, Your Honor, in Transparent-Wrap as follows: "An improvement patent, like the basic patent to which it relates, is a legalized monopoly for a limited period. The law

permits both to be bought and sold. One who uses one patent to acquire another is not extending his patent monopoly to articles governed by the general law and as respects which neither monopolies nor restraints of trade are sanctioned. He is indeed using one legalized monopoly to acquire another legalized monopoly." And the court went on and said that the assignments of patents were sanctioned and there was no difference in policy from assignment, then licensing back of improvements, and that apart from questions of the Anti-Trust Law there isn't any doubt that such an agreement was entirely valid. And it then said that since there were not sufficient findings to determine the Anti-Trust case, it remanded to the Second Circuit. Judge Hand then dealt with the problem in the language which we have quoted in our brief, and he pointed out that during the period when the basic product was in effect, the grant-back, in this case from Sylvania,

was verbally a double monopoly, the phrase the Government
10550 like to use, but that actually those grant-backs added nothing to the defendant's control over production. He pointed out that since the party licensing back could not have practices those patents without the basic patent, there was no Anti-Trust significance to the fact that during the life of the basic patent there were grant-backs. Then he went on and dealt with the situation on the assumption that some of those grant-backs might have involved machines which escape the basic patent, a situation we do not have here, and he pointed out that even if that were so, there was no showing of any unreasonable restraint because there was no showing that the patents licensed back involved improvements of any commercial consequence.

Here, Your Honor, we have proof that this grant-back existed only during the period of the basic patent and we have clear proof that the nine patents that came back from Sylvania were of no consequence, could not be independently practiced without a license under the basic dominant patent.

The COURT. Did you ever pay royalties on any of those patents?

Mr. GESELL. We never used any of them, Your Honor. We never paid royalties because we were only required to pay royalties if we used the patents. We took the licenses because under the contract, as Your Honor will recall, we were required to make a decision within three months of the time that the patent issued.

There was no exchange of applications.

10551 There is in a Government exhibit—most of our evidence comes from the Government case here, Your Honor—a Government exhibit, GX-2827, which shows the considerations operating in duPont with respect to taking these particular licenses. The letter is from Mr. Pralatowski to Mr. Hatt, concerning Sylvania patents, and it says, "I think we should adopt the policy

of taking licenses under all of these Sylvania patents as they issue because it is difficult for us to tell what we may wish to do in the next 17 years, and if we do not exercise our right to take a license within three months, we lose our right to do so. Accordingly, I recommend you write to Dr. Wallach in response to his letter and indicate your desire to take a license under this patent."

As Mr. Smith testified, all of the patents seemed to have some possible commercial use; none of them was ever used. Some of them were used by Sylvania—not all of them were used even by Sylvania in its own operation—none of them is of any commercial consequence in themselves, none of them covers competing processes in the sense of a completed process or an important new development. And I point out again, Your Honor, that those licenses were extant on an exclusive basis only during the life of the basic product patent which the Government asks you to find was of such tremendously broad scope that it dominated and controlled the manufacture, sale, and the use of this article.

10552 There has never been, Your Honor, a decision by any court holding that such an agreement violates the Sherman Act, and there is this recent and explicit decision of the Supreme Court and Judge Hand saying that that kind of an agreement does not violate the Sherman Act.

So I say to you, there was no abuse in the so-called patent pool aspects of this agreement to which reference has been made.

I want then to turn to a discussion, Your Honor, of the so-called quota provision of the agreement.

The COURT. Let's take a five-minute recess.

(At this point a brief recess was taken.)

Mr. GESELL. The remaining feature of the Sylvania moisture-proof patent license agreement that the Government criticizes is the so-called quota provision, and I want to cover that because I do not believe that that provision in any way taints the agreement with illegality or constituted an abuse of the patent. As a matter of fact, we are pretty close to the Government apparently on this because they do say at one page of their brief that under normal circumstances a licensee may restrict his licensee's production. Of course, the rule is that a licensee may restrict his licensee's production under a product patent. They put in the words "under normal circumstances" because they feel our size makes anything we do abnormal and illegal, but of course that isn't the law.

10553 Just what was this provision? It established a limit upon Sylvania's production by what the Government refers to as a penalty royalty provision. But there are certain things about that provision that are worth special emphasis. In the first place, the percentage was on a rapidly ascending scale. In the

second place, there was no limitation upon the amount they could make for export. There was no limitation on the amount they could make under their own patents.

Now, this provision we can deal with just as though it had been, it seems to me, a flat poundage provision. That would have been equally lawful. But duPont chose a percentage approach.

For the 12 years under that agreement Sylvania was well under the permissible amount before the new and higher royalties attached, and in that period its production grew, Your Honor, from 2,200,000 pounds to 23,300,000 pounds. Its evidence shows that it expanded as rapidly as its financial facilities would permit it.

Now, I am very confused as to what the Government's real position is because, as a legal matter, there isn't any question that duPont, granting the valid document patent to which I referred this morning, could impose such a limitation upon an infringer whom it sued as a term of settlement under this license agreement, and I want Your Honor to bear with me while I try to trace out here the inconsistent and very confusing position that
10554 the Government has taken.

It says, it is all right under normal circumstances. But then it says in its trial brief that the royalty provision dictated a policy of curtailment, and the theory was advanced to Your Honor in the early stages of the trial that Sylvania never knew where it stood and this magic percentage was always there, and in fear and trepidation that it might exceed it, it held back and never went forward.

Then the Government reached its exhibit, GX-2681, where within a month of a particular quarter Mr. Hatt reported to Dr. Wallach where Sylvania stood percentage-wise under the agreement, and the Government attorney then said that Your Honor should observe that Sylvania was conscious at all times, watching closely where it stood, and that the parties were notifying each other of where they stood. So it took a different position, first, that they never knew and that they were in fear and trepidation, and then that we told them, and that there was something wrong about telling them. Of course, Dr. Reichel testified that he always knew, and the Government put in exhibits showing that they were not curtailed by the operation of this provision. But then we take a further step. Toward the end of the trial the Government came in and introduced in evidence those tax affidavits over which Your Honor will recall we had such a controversy, and still have such a controversy, and the whole gravamen of those ex
10555 parte statements by Sylvania was that it was not injured by any quantity limitation, that it never paid any attention to the quantity limitation because its attorneys had told it that such a provision was unlawful.

Well now, how can the Government take the position that they didn't pay any attention to it, that they curtailed them because they didn't know where they stood and that we notified each other and they knew exactly where they stood? It can't take all those positions, and the only position Your Honor can take is the factual position. It is impossible to reconcile these theories any more than it is to compare the agreement to the feudal system, as was attempted yesterday.

The facts are that this limitation was an academic problem from the beginning. At the start the 20 per cent was well over where Sylvania stood. It never reached that percentage and in the period from '33 to '45, Your Honor, it could have made 53,000,000 more pounds of cellophane than it did and not come within any of the prohibitive royalty provisions, or a 31 per cent increase in its entire domestic sales for the period. Reichel testified it did not limit them. Then they put in Replogle's affidavit, GX-564, in which he said that the market demand was always in excess of the company's capacity to produce and that to the extent of the company's financial resources it increased its capacity tremendously.

So with all that increase and all that drive and all that
10556 testimony, there isn't any question that this provision had no effect which is an effect of any consequence in a monopoly case, and the reason for it, Your Honor, is clear, that since it was a percentage tied to the total production and since the total production of this product was expanding so rapidly, the provision never had any limiting effect. And as I say, its legality is clear.

The COURT. Well, what does the record show as to the intent of duPont in desiring such a provision?

Mr. GESELL. The record is silent as to the intent of duPont other than that that limitation was suggested by duPont, Your Honor, and there is some correspondence that indicated from the outset duPont desired to place a limitation upon the amount that Sylvania could produce, and I would assume its intent was to put a limitation upon the amount Sylvania could produce, an entirely lawful and proper purpose, since under the valid dominant patent it could have put it out of business or it could have specified these pounds or those pounds, and here was a crowd that had come in and illegally and blatantly proceeded to manufacture in derogation of the patent. And I think it is a fair inference to say that that was not welcomed with enthusiasm by duPont which had developed a patent, which thought it was valid, which put in the engineering, and therefore they said, we believe we should not permit unlimited production by Sylvania.

The COURT. Well, was the insertion of the provision in the
10557 first instance an element of the settlement of the litigation between the parties?

Mr. GESELL. In the sense that it was one of the bargained terms of the agreement, yes.

The COURT. Which resolved their difficulties?

Mr. GESELL. It was in the agreement from the beginning, just as the exclusive license provisions, the consent provisions, the royalty provisions—they were all bargained at that time in settlement of the litigation, Your Honor, and there was no later imposition.

It would seem to me a natural bargaining provision. Your Honor will recall that at the time they considered another provision. They considered whether or not they would put in a price provision, and the legal people in duPont advised that of course they could under this valid product patent, and they said they didn't want to be tied to Sylvania's prices and they didn't put in any such provision. They were advised by their counsel that they could put in this provision, as the Government says under normal circumstances you still can—of course, you can—and under a dominant product patent there isn't any question that you can.

The COURT. Under U. S. against General Electric, was that the legal theory?

Mr. GESELL. Certainly that was the prevailing doctrine at the time.

The COURT. That has not been overruled yet.

10558 Mr. GESELL. It has not been overruled, and in our brief we have quoted quite a number of other cases that recognized this quantity limitation.

I emphasize, we have got a product patent, leading entirely on the article. But I say to you, you can look at it in two ways. You can look at in the legal way—and we seem to be almost in accord with the Government on that; certainly the cases are our way on it—or you can look at the thinking of this as a monopoly suit, what was its effect, legal or illegal? Did it have an effect which in any way contributed to duPont's so-called dominant position? Of course, it did not because these people with all their financial resources, could not make enough to even come up to the limit, and the testimony showed that they were off experimenting with horsehair, in financial difficulties, and doing a lot of other things that detracted from their competitive abilities.

So both from the legal point of view, from the factual point of view, from the effect point of view, it had none of the repercussions which the Government in its theoretical approach likes to suggest.

How can you say that this limited a co-producer when the co-producer says it did not, when the Government's own affidavits and evidence show that it did not, when the statistics show that it did not? You just cannot—as a fact finder you cannot. You

cannot indulge, if Your Honor please, in inferences
10559 that the Government would ask you to draw from the four corners of the contract when the parties to the contract and the production and all the facts show that those inferences are not supportable. And that is the whole problem we run into on other phases of this case as well. But here it is crystal clear. They could have produced 53,000,000 pounds more, apart from exports, a 31 per cent increase in their sales.

Now, they say in that same general area, Your Honor, that this agreement stifled Sylvania's research—no record citations because there isn't any record that says that it stifled their research. We don't know to this day whether Sylvania spent more money or less money than duPont on research. We know who had the most effective research, we know who made the inventions, but we don't know who spent the most money. We know nothing about their research. And their growth was not impeded, and the agreement said nothing as to what they could do about research, how could it have stifled research? There was no exchange of applications under this agreement; there was no exchange of know-how and technology under the agreement.

Your Honor, we now come to another aspect when we are talking about effects under this agreement. Your Honor raised it very pointedly with the Government counsel yesterday, and I thought you got a very oblique answer. No person ever wanted a license under the moisture-proof patent to manufacture moisture-
proof cellophane and had it denied—no one. The theory
10560 of the closed patent pool, therefore, is again pure theory because there is no showing that any one came along and said, "I want to put in casting machines and construct baths and make this investment and make moisture-proof cellophane"—no one.

On the other hand, there were seven people, Your Honor, who were licensed under the basic moisture-proof patent. So you have evidence of a licensing policy—we covered all that in our Finding 563—and you have no evidence of any denial of a license to anyone.

Finally they say that the effects of this agreement were to carry on in some way beyond the basic patent. Well, I pointed out there were no executory provisions beyond the basic patent other than the payment of royalties, that only those patents that were being used were to be licensed. In point of fact, by 1945, before this litigation, everything became nonexclusive. There was no continuing pool for two years before the expiration of the basic patent. So there isn't any effect that you would expect from a pool, there isn't any of the effect that they say existed in the quota, and you have here the admitted license of a dominant patent

and we say that on those facts the patent was not abused and we say that on those facts you must grant to us in the decision of this litigation the right to do those things which the patent gave us the right to do.

May I show Your Honor what the implications of this patent defense are in the broader aspects of the litigation.

We have had the charge made that our research was conducted for a monopolistic purpose, that our pricing was for a monopolistic purpose, that our additions to plant and construction of new plants was for a monopolistic purpose and that our selling scheme was for a monopolistic purpose. Well, if we had a product patent valid and dominant as this was, how can the United States Government ask you incessantly to make inferences that our research and our pricing and producing and our selling came for an illegal purpose when they are all clearly the exploitation of the patent, the promotion of the science and the useful arts under the patent, research design to improve the patent and to develop new uses and to lower cost—the dedication of capital to new plant and the employment of new people, and all that goes with developing a patented invention. And they say, no, these lawful acts must all be overlooked because we are so big. But big or not big, if we are developing and promoting a patent, how can you draw those inferences of illegality that they ask you to draw?

I am going to come to that further as I talk about this question of monopoly power, but I want to show you how this patent cuts across whole areas of their case. Can research designed to develop and exploit a patent be shown to have an illegal monopolistic purpose when the patent is valid under the facts of this case, not some other case, not a case that they will cite to you where there was a process patent, not a case where there were efforts to tie in and control nonpatented products, not a case where there were broad price-fixing agreements apart from the patent? But how can they on the facts of this case draw any inferences against the defendant for conduct which was in the direction of promoting the science in the useful arts?

Well, that is the first major segment of my argument, if your Honor please, and unless your Honor has questions on the patent aspect I want to turn to a discussion of monopoly power.

As your Honor is aware, Section 2 of the Act does not attack monopoly as such. It has frequently been noted that monopoly is not condemned. The issue is monopolization. The Act is directed not to status, but to conduct, and the conduct your Honor must find to find that this charge of monopoly stands is that we have exercised monopoly power, and the test, the ultimate test in this case, is whether as of now, as you sit in equity looking to the

10563 future in a remedial capacity, duPont has monopoly power, market control, or whatever you want to call it.

Throughout the Government's brief imported from another case they discuss this subject, and at pages 6, 23, 46, 57, and 110 they emphasize what I am saying to your Honor now, that the monopoly power is the test, and that power is very clear: It is the power to raise price or the power to exclude competitors when it is desired to do so; and your Honor has to find out whether those powers exist. If they do not exist, the complaint is dismissed. If they exist and have been exercised or acquired in a manner prohibited by the Act, then the Anti-Trust Division prevails.

And so it seems to me that the inquiry your Honor must make and must put everything else to one side in making at the outset, is whether or not these powers exist. It does not make any difference how duPont's position was acquired or what duPont has done if it does not have the powers now. You must ask yourself Does duPont have the power to raise the price of cellophane without substantial regard for competitive factors and does duPont have the power to exclude others from the manufacture of cellophane when it desires to do so? These are the ultimate tests under the cases. They were pleaded in the complaint and they are fully covered in the arguments of the Government. We say those powers do not exist and that those two ultimate questions

10564 must be answered in the negative, and that when they are answered in the negative this complaint must be dismissed.

Now, if your Honor please, there has been no case—and that is why I say this is in the forefront of anti-trust enforcement—which has more sharply raised these bare issues of monopoly power; there is no case that I know of where the proof has been more concerned with these questions; and while the power tests have always existed, the facts in other cases have made their application pretty simple. But here the bare question of power is in more sharp focus and the problem is more difficult, and I think that is a reason why this case is destined to be a landmark case in the development of the Anti-Trust Laws.

We agree with the Anti-Trust Division that the issue is as I have stated it on these two powers, but we part company, and we part company sharply, at this point. The Anti-Trust Division wishes you to infer and theorize the power, and we say that proof of power is a question of fact and that they have the burden of proving that power, and if they don't prove it the case is out.

It really isn't to us surprising that the Anti-Trust Division has a short argumentative set of findings and a long economic brief discussing theories of the workable competition and the views of various economists; where we on the other hand

10565 have piled in the evidence on what the competitive facts of this market are and the evidence that goes not to which economist has the best theory, but whether power exists in this case in the legal sense. It can't be inferred by theory; it must be proved. For if this statute is violated we would be subject to a criminal as well as a civil offense.

Now, we want to show you as best we can why we say the Government's position is theoretical and why we say, as a matter of fact, the powers cannot be found by any of the customary fact-finding processes which must be used here.

It seems to me as I listen to Mr. Minicus and his associates and read their papers that they have from the outset assumed the power and then argue that every fact that comes along proves it. They put the cart before the horse, and it leads to a highly theoretical approach. If I may illustrate from the case, it has, for example, in this case, your Honor, been contended at various times that this prohibitive degree of power over price, for example, exists if duPont lowers price, if duPont keeps price stable, if duPont raises prices, if duPont operates at a loss, if duPont makes too much profit, if it prices different grades of material differently, if it considers the competitive effect of price reductions, if it fails to consider the competitive effect of price reductions. Well, now, we can't prove power over price under an explicit statute by any such convenient rationalization as that which simply says

10565a they are big, anything they do proves power, this is what they did; and if it went up or it went down or it stayed the same it is all the same with us.

Similarly, on this exclusion of competitors, your Honor, it has been argued here that if we build plants to meet demand that shows the power. It has been argued here that if we failed to build plants and a shortage results, that shows the power. It has been argued here that if we take lawful steps to meet competition in the putting down of a plant, that shows the power.

Consider a moment the long discussion about the rectangle that we had from the Government table the other day in this plant location problem, where serious business documents were read to your Honor showing that we thought that a plant ought to go in Clinton, Iowa. We thought a plant ought to go there. It was on a corner of a rectangle. Why did we think it ought to go there? Well, Chicago was a big market. We could ship to Chicago more cheaply. If we got there we would have an advantage over Sylvania which was down in Fredericksburg. There seemed to be good clean river water there. It was close to raw materials, and so forth. And so these men sat down and thought it out and they decided we better put a plant out there, and that was shown to be an exertion of a monopolistic power. Well, I thought after-

wards, your Honor, what could we have done? Suppose we
10566 took the prettiest stenographer in the cellophane division and blindfolded her and turned her around three times and had her throw a dart against the map of the United States, and wherever that hit we would put up the plant. We would have heard from the table here "Can you think of anything that is more monopolistic? No regard for water supply, no regard for markets, no regard for competition position." The fact is we could not build a plant and escape the criticism of the gentlemen at this table, and the reasons we can't build a plant are always lurking here. They are after us because they say we are too big, and that size and success must be penalized.

Now, that kind of a theory is not what the monopoly statutes say. They say these powers must be explicit, they must be express, and they have to be found: and certainly everything that a big company does cannot a fortiori be proof of power.

I am reminded, your Honor, of the old jury lawyer that got a little mixed up when he was closing to the jury and said, "These, ladies and gentlemen, are the conclusions on which I base my facts." That is exactly the way this case has been presented to you, and I want to turn it around and present the facts to you and then see what you think the conclusion should be.

Now let us take this question of dominance which they argue.

They say dominance and monopoly power are the
10567 same thing. Dominance is 75 per cent, 75 per cent is monopoly power, and therefore you have a per se violation of the law. Couldn't they make the same arguments they have made here, your Honor, if we had 60 per cent? Couldn't they make the same arguments if we had 50 per cent? There isn't any degree there, is there? We would have done the same things whether we had 50 per cent or 60 per cent. In fact, in the case of rayon where the same people were running the rayon business and the cellophane business in the du Pont Company, and where the record shows we had 20 per cent, we did the same thing. We put in plants, we lowered price, we sought volume, we preferred to take a low margin of profit on a single unit and get lots of profit by a large volume. We did just the same things. I think that illustrates to your Honor that they haven't any content to their argument when they simply say dominance, dominance, dominance.

Let us take research, which is one of my favorite subjects, because it is the thing that makes duPont the great company that it is and it is the thing that made the cellophane business what it is, and let us look what happened in this case on research to show you this theoretical approach that we are battling with.

I put Mr. Mitchell on the stand and I began to question him about research, and there were cries of anguish from the Gov-

ernment table—"irrelevant, don't go into it, don't want
10568 to hear about it." He testified as to the motive of research, the results of research, and the character of his research. He was not cross-examined. The Government said that was all irrelevant. Then they come along in their findings and in spite of his testimony they say that research did not contribute to du-Pont's success, that its patents are trivial, that there is no showing that they had any technical superiority over Sylvania, and findings of that kind. In other words, it is of no consequence.

Then they come to the power part of their argument and they argue to your Honor that it is a serious indicia of power that research must be curbed and be more equitably distributed. They make no showing of what the present distribution of it is. They don't care about that. They assume things that are not in the record. Then they end up and say "We are not attacking research, but it is an example of monopoly power."

Now, your Honor can't write a decision on that kind of theoretical approach to a statute that is on the law books, and I want to tell you that over these months it has been a very difficult kind of a case to defend, because I feel as though I am in a room fighting a whole bunch of feathers and I never can come to grips with the realities of this case.

Now what I would like to do is pursue this theory a bit
10569 further to show you what they have in our judgment been up to. They say, for example, your Honor, that our earnings are exorbitant. They ask for findings on that. They walk up and down and say so. There is no proof of the earnings of anybody else in any field. Is your Honor just to reach out and say that a certain return before taxes or after taxes or operating or net is exorbitant when you have no proof, and then say that since it is exorbitant it is an indicia of monopoly power and we are to be held here to these penalties? And yet that is what they say to you, and there is not a scintilla of evidence in the case that our profits are exorbitant except their feeling that it is a lot too much money to make. Mr. Sherman did not say there was any amount of money you could make, particularly when you made it efficiently.

Let us take another thing. They say that marketing outlets were foreclosed and they talk and talk and talk about foreclosure of marketing outlets. You can search this record from beginning to end and you can't find out how many marketing outlets there are, where they are located, how strong they are, which ones are in duPont, which ones are in somebody else; and yet you are asked to make findings that we have engrossed them and that we foreclosed everybody from them; and a representative from Olin and a representative from Sylvania took the stand and said they never no-

ticed it; but the Anti-Trust Division has noticed it with
10570 no evidence, your Honor, in the record on it at all.

We are charged with engrossing patents, if your Honor please, and that is put to you as an example of this monopoly power. We do not know now and we did not know at any stage of this case how many patents Sylvania had; we do not know how many patents Celon has. We do not know except for the statement there were some 7000 how many there are in the cellophane art. There has been no presentation to you as to what these patents are other than these basic ones which I have made. What their significance is to the art we have not been told. The Government asks you to find they are trivial, and yet we are charged with having engrossed them. Then we are charged to have been monopolistic because we used only 30 per cent of them. There is no comparative data of any kind. Many published sources indicate that is a high percentage of use.

We are charged with engrossing research, and again, your Honor, there is no proof as to how much money Sylvania put on research, Olin puts on research, the packaging industry puts on research, the chemical industry generally puts on research, whether this was excessive or was not excessive. This case on the main arguments that Mr. Minicus has been advancing to you is premised purely on the hypothesis he had when he drew the complaint, and it is not premised on facts of record.

10571 I want to ask you for a moment just to take a look at what he has been saying to you and see how easy it would be to decide that anybody was a monopolist. Let us take the Ford Company. I don't think they are a monopoly, but just take them for a minute and think about that. They have lowered the cost of their cars; they have a research organization; they have a distinct consumer preference because a lot of people like Fords and not Chevrolets; they have exclusive dealerships; they have strategically located assembly plants. The fact is he has just taken normal business facts from this record and used them all to claim they show power. But the power is something more precise than that. He has to show that we have proceeded in an unreasonable manner in disregard of competition and the normal pulls and tugs of the marketplace, and there isn't anything that shows his theoretical position more than that. From the outset he has tried to prevent us from showing how we compete and with whom we compete when how we compete and with whom we compete is the explanation of a great deal of the conduct that he wants to bring into criticism; and the question is, Are we able now as to price and as to competitors to proceed in an unreasonable manner in disregard of competitive influences, and we say we are not; and what I want to do is spend some considerable time first on the power to

exclude, about which we had so much discussion during the
10572 Government's argument, and then turn to price and deal with those two powers which both sides recognize as the earmarks, and to show you not on theory, but on fact that these powers do not exist, and that this case does not fall within the ambit of those cases which have found power in monopoly situations in the past.

The first thing I want to talk about is the power to exclude competitors, as the cases put it, when it is desired to do so. This falls, I think, your Honor, under the evidence and the theory of the Government in two parts. They quite properly say if we have excluded competitors unlawfully that that is evidence that the power exists, and so of course we have to deal with whether we have or have not excluded competitors, and we say we have not.

The other question is do we—and this is the one the Government pushes first and foremost—Do we because of what they call dominance, and which you can call 75 per cent or 20 per cent, depending on how you look at the markets—and both percentages are relevant—have power as an economic and business matter to exclude competitors when we desire to do so?

Now, this power, your Honor, must be a power which is something more than just the ability to conduct business successfully. I suppose it is fair to say that in a sense every sale excludes a competitor, particularly under the Government's theory of momentary consumer preference seizure, because you get that
10573 business. If you get business by lower price or better service or because you have a particular type of cellophane for a particular use, or your quality is better, I suppose any of those things in a sense exclude a competitor; but if that is monopoly power then everyone who is doing business in the United States has that power, because everyone is doing those things every day. So it cannot be that merely normal business acts taken in competition show this power. It must be based upon more concrete facts—the kind of facts that were present in the Aluminum case and the Tobacco case and these other decisions.

10574 In the first place, I think it is important to note that there are no economic obstacles of any kind that give du-Pont the power to exclude when it desires to do so. Let's just take a few of them and run them down. They are all typical of other cases; they are not present here.

Take raw materials. There is no control here, Your Honor, by duPont of raw materials. There are numerous suppliers of raw material. It is plentiful, in quantity. There has been no charge of even cornering raw materials. Olin, the new competitor, has integrated and bought its own wood pulp supply. So

that on the raw material stage there isn't any kind of an obstacle to any newcomer coming into this business.

Then let's take technology. Is there control of technology, which is one of the things the Government likes to talk about? I think it's clear there is not. They say themselves that cellophane is an open art. They pointed out yesterday that people all over the world are making cellophane, and they are certainly not making it with the aid of duPont. Sylvania and American Viscose conducted their business from the outset without duPont technology other than the licenses under the patents that they had from us. They got their know-how elsewhere. There is no evidence that there resides in duPont some control over such vital technology that others cannot from normal sources obtain information and go into the business today.

Then what about overhanging capacity, which is some-
10575 thing that they like to talk about because it is a phrase that they found in different situation in the Aluminum case? Well, the evidence here doesn't show that. The evidence shows that the capacity has been geared to demand. It shows that all manufacturers are expanding. Indeed, the Government asked for findings that there isn't sufficient capacity. Our own findings show that it has fluctuated with the business and economic conditions from time to time in Finding 455. We have explicit testimony from the man responsible for the capacity program that throughout the entire period of the business there was no program to create a shortage or to put excessive capacity into operation, and that, for the most part, the company was in an over-sold condition. That witness was not even cross-examined.

There is not any control shown of packaging machinery. We have invented and helped invent it; it is available to everybody. There are no converters or other distribution outlets tied to us in any way. No control has been shown by us over any customer or group or categories of customer.

So I say to you, where is it that this 75 per cent gives power to exclude others from entering into this business? And I don't think the evidence is there as a matter of fact opposed to theory. Some of the Government attorneys may think they don't want to go into business if somebody has 75 per cent. But that is not proof of monopoly power. And they are not businessmen, as they have repeatedly shown.

10576 This is a fact case. There isn't overhanging capacity, there isn't a tying up of outlets, there isn't a tying up of customers, there isn't a tying up of patents and technology, there isn't a tying up of raw materials—so where is it that they say this comes from? And I think when you analyze their position,

it is nothing more or less than 75 per cent, and as we have shown you, Judge Knox, in his recent opinion, made clear the dominance and monopoly power are distinct and different things, and the cases have repeatedly said that monopoly cannot be established by any particular statistic.

They told you at the close yesterday that they had found an identical precedent, Judge Forman's decision in the General Electric case, a Section 1, a Section 2, and a Clayton Act case all lumped together in 160 pages of close type. And what was the evidence there of the monopoly power as compared to this case when you look at this identical precedent? General Electric bought up its principal competitor and its 18 subsidiaries. It took over control of the lamp manufacturers association. Although its basic patents had expired, it regimented all the lamp manufacturers and distributors by quotas and price-fixing agreements that were illegal. It persuaded bulb suppliers not to supply anybody else for lamp manufacture. It had Corning buy up one bulb manufacturer and exclude another to get control of that raw material. It forced all of its customers to acknowledge the
10577 validity of its patents even though they weren't licensed under them. It organized a company abroad for the express purpose of buying up patents to keep other people from selling into this country. It had a combination with the principal U. S. manufacturer, who was also a defendant in the case. It cornered machinery and component parts into its own control. And the evidence showed that the research was used for the purpose of shortening the life of the lamp in order that more could be sold. And that is presented to you as an identical precedent with this case.

The COURT. We will recess until 1:30.

(At this point a recess was taken until 1:30 o'clock p. m., the same day.)

10578 ONE-THIRTY O'CLOCK THE SAME DAY.

Present: As before noted.

Mr. GESELL. When we recessed, your Honor, I had just called your attention to the difference between a theoretical case such as we have here and a fact case where the facts are present as to power, such as General Electric, which I hastily reviewed. Still discussing the general approach that has been taken here, I want to deal for a moment with another example of the effort of the Government to go beyond the record to bolster up its rather theoretical approach to this power question. And I just jotted down seven facts which were at the center of the argument presented to you as examples on this exclusion issue.

You were told that in terms of modern technology cellophane is comparatively simple and that production is elementary, far

simpler than the installation of a telephone exchange or the making of a gyroscope. Well, there is nothing in the record on that, Your Honor, nothing whatsoever. The only evidence about the technology is the view you took of the plant itself and the explanations that we have put forward of the details of the process. So I hardly think it proper to found an argument on something of that kind.

We were told that the capital costs in this industry were small compared to a multitude of other industries, such as farm equipment and electrical equipment. Well, there isn't any evidence of that—none whatsoever. We don't know what the
10579 capital costs are of the farm equipment and electrical equipment industries and a multitude of other industries, and certainly the figures don't seem small that we have as to what it cost to go into cellophane.

We were told that a million dollars wasn't a large capital cost for a machine. There is no evidence as to that.

We were told that Mr. Ford had an extremely modest installation for the making of cellophane in Wisconsin. There is no evidence of that.

The COURT. Is that Ceylon?

Mr. GESELL. That is Ceylon. We don't know whether it is modest or immodest; we don't even know whether it is for making cellophane. But we were told all that on the argument.

We were told, Your Honor, that rayon producers have knowledge to make sheet cellophane, and specific rayon plants were mentioned all around the neighborhood here, ten producers, and we were told that rayon producers had the basic processes, the basic machinery and know-how to make cellophane. There is no evidence of that, Your Honor. There are no facts showing that.

We were told that DuPont had buttressed its entire activities by horizontal integration, that it had incomparable trade connections, exceptional foreign affiliations, and that anyone dealing with it was at its mercy. Well, there isn't any evidence as to that.

What I want to do in mentioning these facts is to [illegible] point up again that when the Government comes to grips with the case, it must stay within the record, and it can't go out and pull together a lot of facts that it has not proven when it finds its theory in jeopardy.

Now, let me give an example. Your Honor said after all these facts that are not in the record had been thoroughly reviewed to you, wholly and properly I thought, "Well, if that is true, why didn't people go into the business?" And you received a rather customary answer, in this case, "I am coming to that." Well, three people, the evidence shows, were interested in going into this

business and the evidence shows why they did and why they didn't. So we are not in the realm of theory; we are in the realm of fact.

The first one who wanted to go into the business was Mr. Wolff, the German, and he came over here and offered his process, and he offered his process to a company which did not go ahead because the capital expenditures were too great and they could not be raised, and he offered it to another company that thought they were not sufficiently good processes to justify commercial operation. So you see, we don't have any theory that we have to come to; we have a fact: Wolff did not go in because he could not raise the capital in this country, a fact, I point out, that has nothing to do with duPont's monopoly power; it had to do with the market crash of '29 and the unavailability of capital at the time, and it
10581 had to do with the inadequacies of his own process.

The next example is Olin, and the head man in the cellophane part of Olin's activities was on the stand and he said, "We considered going into the business and decided not to because the Wolff process was inferior and because of the moistureproof patent," and we said, "Did you ask for a license under the patent?" "No." So now we know why Olin didn't go in, and it is not theory, it is fact.

The third person who wanted to go in was Sidac, and Sidac went in. Sidac had technology which had been stolen abroad. It was able to raise the capital and it went into the business. So there isn't any question as to why people did and didn't. We have concrete examples in the record. And they are not examples consistent with the theoretical arguments that technology meant nothing, that capital meant nothing, that you could put up a little installation and go ahead, and that some all-pervasive dominance or power kept people out. They were kept out by a patent or by technology and by capital costs.

10582 Now, I think we also ought to recognize that many people have gone into this business in addition to the two that are in cellophane to compete for this market in other closely related ways. Goodyear with pliofilm, Dow with Saran, Celanese with acetate, and the converters with their laminants, and various glassine and waxpaper manufacturers, and Visking and Olin with polythylene are affording effective real competition; and many of those people as good businessmen preferred to develop their own particular closely related product which they would have themselves and be in a position therefore to exploit in this very active market. Goodyear is the only person who makes pliofilm; Dow is the only manufacturer of Saran, and so forth. But they are all in there competing, too, and that is actual competition.

So I say that there are no economic facts that are in any way indicative of improper monopoly power in duPont's hands. It has

not corralled any raw material or otherwise regimented the market. We know concretely why certain people did not go in. They had nothing to do with the exertion of any power by duPont. And remember, if your Honor please, that there is actual competition here not only of these other materials, a point that we will discuss later in more detail, but two active competitors in the cellophane business. There isn't any question of Sylvania's competition or Olin's competition, that it is real, that it is
10583 concrete, and that it is effective; and the effort to talk in this case in the context of the Aluminum case where there was no other producer, of course, just does not wash.

What I would like to do is turn now to these specific so-called excluded competitors.

The COURT. Before you arrive at those, refresh my recollection as to whether the record shows what are the growth possibilities of the two competitors in cellophane and also the manufacturers of these allied substitutes.

Mr. GESELL. Well, the record shows this:

Taking the cellophane people first, your Honor, it shows that Sylvania has plans to expand up to 100 million pounds, and that that is in progress. There are, of course, no reasons why from a capital or other point of view it can't expand further. With the acquision of Sylvania by American Viscose not only has the quality of their cellophane vastly improved with the technology that comes from that very potent company, but of course they now have very substantial financial backing and are in a position to go forward as far as they desire to go.

In Olin's case the facts are these:

Olin has first of all integrated by acquiring its own source of raw material by the acquisition of a big forest and the related business. It has acquired land for a new plant site. It has
10584 indicated to duPont under the contract that it desires to put in another eight-machine plant and has that under consideration both as to plant location and as to construction. So that it is also in a position to go forward.

Now, we know that the assets of American Viscose are substantial. We don't have any figures as to the total capital situation of Olin but we do have considerable evidence that their activities are varied, which has included also the construction of a big research laboratory and the acquisition of a polyethylene business to complement the cellophane business. Now, in terms of how far they may grow or could grow there are various estimates, and they are simply estimates of what are called market potentials for cellophane, which of course contemplates the taking of business away from these other materials. But under those

estimates there is an unlimited field for expansion available to either Olin or Sylvania, and for that matter as to duPont.

As far as the others are concerned, it is clear that each of those concerns that I mentioned, Goodyear, Dow, and Celanese, for example, are all very substantial concerns, well financed, and there is no indication of any limit on what they may desire to produce. We know that in the case of pliofilm there has been a very substantial expansion which has taken place, and we know that as to the market as a whole it would mean as to each of these individuals that the market has very substantially ex-
10585 panded. Not being a static market, but being a very growing market, there has been great opportunity for everyone to expand and come in. There are no brakes on any of these people as far as their expansion is concerned, and certainly none that duPont can impose. DuPont, as the record shows, has no patents that can stop any of these fellows from going forward. They are all free to go ahead as they choose. There are no agreements shown of any kind that bind them. They are all well financed, competent concerns, and with a growing market it seems to me clear that they will grow as they have grown in the past. So that I don't think there is any evidence here of a competitive race between all these concerns to see who can gain business by good quality, good service, and a good product, and the competition, of course, is concrete and actual. It is, of course, a most difficult thing to see how a case can be based upon exclusion of potential competitors in the face of such concrete evidence of competition, which in itself negatives the existence of the power to exclude, because these people have not been excluded from the market, but are participating.

Does that cover your Honor's question?

The COURT. Yes.

Mr. GESELL. Turning, then, to the potential competitors, I want to take up the evidence on those, particularly since so much time was spent on that in the Government's argument. We
10586 cover the evidence in some detail at page 59 of our brief, and of course they cover it very explicitly in the findings. But I think we can perhaps by discussion of it throw some further light on the problem.

I suppose the starting point is to say Who is a potential competitor? And the best definition we have been able to find is in the Paramount case which we cite in the brief from 334 U. S. as a person having the desire or having the capacity to go into this business, and starting with that we tested the facts to see which of these people had the desire or had the capacity to go into it, and we then tested the facts to see whether they were in any way excluded illegally from entering into the business.

Now, we have got here, your Honor, again a very sharp clash between fact and theory. It is said that these people were excluded. The evidence of their exclusion is usually some formal contract involving the limited licensing of technology. Then the man who is supposed to have been excluded has taken the stand and he has testified, and your Honor is asked to find by the Government that the man did not tell the truth, that the witness—although no effort was made to shake him on the stand—was perjuring himself, and that in spite of his denial that he had any interest in going into the business and was not excluded, you are to find that he was. Now, I can't see how that is possible in this court, and therefore I want to put the emphasis upon what
10587 these people said. They were people who subjected themselves to cross-examination, who testified under oath, and the only kind of an attack that the Government has been able to make on them is to say, "Well, they are all anxious to please duPont." But there is no evidence of that. There is no evidence that they are not independent and truthworth' people.

Let us take a couple at the outset in the cap and band area. Mr. Feagley was on the stand, and at page 6164 of the transcript he was asked this question:

"Question: The Government contends that your company was excluded from the manufacture of cellulose caps and bands. Did anything duPont did have that effect on your company?

"Answer: No. I have answered before that either in my own mind or any expression of thought that I heard in the general company council we never had the least interest in it."

Well, if duPont did not keep them out and they never had the least interest in it, and the showing is that they are a big distributor of corks, how can you say that there was a potential competitor excluded by duPont?

Take Mr. Schneir. You will recall he was on the stand, and he at transcript page 6730 had this to say—he is another cap and band fellow. These were the two men who were added to the list in the eleventh hour after some of the other evidence as to
10588 Skenandoa and one or two of the other companies rather collapsed. Mr. Schneir said this in response to the question:

"Question: In response to a question as to the clause in these contracts, Mr. Schneir, on cross-examination you stated that you did not regard that as limiting you if you ever wanted to manufacture; is that correct?

"Answer: Well, sir, I must confess that it would be a very unwise and hazardous undertaking to attempt to manufacture bands in that territory for several good and sufficient reasons: First, consumption does not justify a large operation. Secondly, a new

development might make this entire item obsolete and it would be very unwise to have a heavy investment in fixed assets that have no means of conversion into any other item.

"Question: Let me ask you this: Did you in fact ever want to manufacture bands?

"Answer: No, sir."

I don't think Mr. Schneir manufactures anything. He is a distributor agent.

And so I say that simply because a standard form of contract said that while these people were selling our product they would not engage in competition with us, a contract that they could cancel on thirty or sixty days notice, you can't say that these people were excluded, and they testified that they were not ex-
10589 cluded, and there is no showing that they had the capacity or the desire or anything else to go into the business.

Now let us get over to American Viscose, which is the one that your Honor asked some questions about the other day, and on which the Government places such emphasis.

The charge is that American Viscose was a potential competitor excluded from this business by duPont. In the first place, they are, of course, duPont's principal cellophane competitor, and so we are talking about a period prior to their acquisition of Sylvania. The Government has no evidence of any contract, agreement, or arrangement affecting American Viscose staying out of this business except this one letter on which they place their reliance, GX-4454. It is a letter of Mr. Yerkes to Mr. Goertz, and it had to do with the formation of BCL written in 1934, and the pertinent part of the letter simply says, Mr. Yerkes speaking, "We assume that the parties to the venture"—that is BCL—"will see to it that our rights and interests under our contracts concerning cellophane will be fully protected and that nothing will be done to interfere with or infringe upon either directly or indirectly our rights and interests under our contracts."

In simple terms, that is that Courtaulds, a shareholder in BCL, who also owned stock in American Viscose, would not be permitted in derogation of the contract to take duPont technology from BCL and use it contrary to the contract over
10590 here for manufacture in this country through American Viscose. Nothing to do with American Viscose staying out of the business, nothing to do with American Viscose not being free to go into the business in any other fashion it shows, but simply a statement that we have licensed BCL and not its shareholders, and we have licensed them exclusively, and we don't want this information pirated through a shareholder and brought over to this country.

Then Mr. Yerkes took the stand, your Honor, and at page 6956 of the transcript he had this to say:

"Question: Now, the Government has also made another claim that I want to ask you about, Mr. Yerkes, and that is that sometime prior to 1946 duPont had an agreement under which American Viscose would be kept from entering the cellophane business in this country. Did you ever have such an agreement?

"Answer: No.

"Question: With American Viscose did you have such an agreement?

"Answer: No.

"Question: Did you ever have such an agreement with Courtauld during the period it had stock in American Viscose?

"Answer: No."

No cross-examination.

Now, what are you to do, your Honor? Are you to take a straightforward business letter protecting rights in
10591 duPont's technical information and distort it to an inference that there was a sinister contract and that a potential competitor was excluded in the face of the concrete, unchallenged testimony of Mr. Yerkes? I don't think you can carry that inference, and when you tender the man and you ask him and he said no, and he is not questioned, and there isn't anything but the inference in that letter, how can you find that there was an exclusion? Particularly how can you find that there was an exclusion when in 1935 the Government itself offers in evidence GX-1116 in which Mr. Yerkes states that he told Baron Janssen, who owned stock in Sylvania, that duPont would not have any objection to their selling it to American Viscose. So there isn't any evidence that American Viscose wanted to go into the business or was excluded from it.

In an effort to cover it even further we asked Mr. Reichel if he had ever heard of such an agreement. He, after all, is the president of American Viscose now, and he said no, he never had.

So I say to you how can you conclude except that there is no evidence to support the charge that a potential competitor who is now our principal competitor was excluded?

Now let us take up Rayonier. They are another one on the list that the Government maintains was a potential excluded competitor. I don't know whether your Honor remembers Mr. Pickens, a rather large amiable, bald-headed man who was
10592 on the stand here for some time. He testified about this and he testified again explicity and concretely. He said at transcript 6162 that he was consulted on all new projects involved in the company, particularly those involving anything of

a chemical nature, and he said, "I know of no consideration that was given to manufacture of cellophane." He further testified the company never had enough funds for pulp expansion and that pulp occupied the company's full time and attention and that the company "was not interested in cellophane."

10593 Here is a concern, Your Honor, that isn't in the chemical business, it is in the pulp business, and it is a large pulp concern. It supplies pulp not only to all of the cellophane manufacturers but pulp to a large number of the rayon manufacturers, and here is a man in a position to know, competent in the management, who testifies, "We didn't have any reason to want to go into cellophane; we had enough to do to keep up with our pulp expansion. We didn't even have enough funds for that. We were never interested. We gave it no consideration."

Now, is that company on that testimony shown to meet the tests of the Paramount case, to have a desire or to have a capacity to go into the business? I say not. He categorically said there was no desire, and certainly the capacity was not shown.

For a moment, what were the circumstances of the contract on which the Government places its emphasis? It was a straightforward business transaction which clearly on the evidence was not undertaken for any exclusionary purpose. The facts were just simply these: duPont was not satisfied with the quality and grade of pulp that it was getting, and it wanted to do something to improve it. Your Honor will recall when you went to the plant the form in which the pulp comes, in those white square sheets. It is highly refined. It is subjected to much purification and is in itself a very important aspect of the manufacturing process.

10594 duPont had done a lot of work trying to improve pulp, trying to get the best pulp, because if it could get good pulp, its cost would be lower, its prices could be lower, and it could go further in these markets. So it thought that it would experiment with Rayonier on the hard woods that Rayonier had available.

It made a contract—and this is significant, Your Honor—it was a contract as to both rayon and as to cellophane, not just cellophane, to work with them in both the field of rayon and cellophane for the improvement of the pulp, and it gave technical assistance to Rayonier. It gave them information about its manufacturing processes. All so that Rayonier would know its problems and thus be in a better position to make the kind of pulp that would suit its needs, its needs both for rayon and for cellophane, and the contract was written to provide that Rayonier could not use that technology to make cellophane, not that Rayonier couldn't go in the cellophane business, not that it couldn't tie up with some other manufacturer—in fact, the correspondence at the time shows that

we thought they were perfectly free to do that—but simply and only that they could not use the technology we were giving them in working out our problem with them to make cellophane—a clear, simple limitation on the grant of technical information, and as the fee for that, we took payment in reduced cost of that pulp.

Now, Your Honor, the evidence shows that we bought pulp from a large number of suppliers——

10595 The COURT. That was the question I was about to ask you, whether or not your legal arrangements with Rayonier tended to freeze the source of supply for your other competitors?

Mr. GESELL. No, and I was just going to cover that in two ways. In the first place, Your Honor, Rayonier was free to supply the pulp, improved pulp, that it made as a result of our technology, to others and did supply it to Sylvania, the record shows, as well as to ourselves. So there was no cornering to ourselves the benefits of the work we had done.

Second, Rayonier was but one of several major pulp suppliers, and we put in evidence a schedule that showed the names of those companies, the warehousing people and others, from all of whom we were buying in substantial quantity.

So that the source of supply was readily available there to Sylvania, which got the benefits of our technical work with Rayonier, and these other companies were all in a position to supply. The only limit we put upon them was that they couldn't use this to go into rayon or into cellophane, this technical information that we gave them.

How could that be an exclusion? It is a purely lawful act, reasonable and related to a legitimate business problem. How can it be said that Rayonier is a potential competitor when Rayonier isn't in the chemical business and when Rayonier says that they gave no consideration to that? You know, the extraordinary thing about this, Your Honor—and it relates to

10596 your question—is that at the time this contact was made Rayonier was not able to supply anyone with a satisfactory pulp for cellophane manufacture, and as a result of this work it was able to supply us and it also supplied Sylvania. So I cannot see anything in that that involves the cornering or shutting off of supply; and the advantage we got in a lower charge on the pulp was a modest fee, the record shows, in relation to the value of the technology given.

The next one—unless Your Honor has questions on Rayonier——

The COURT. No.

Mr. GESELL. The next one is Visking. Your Honor knows that they are now a large manufacturer of sausage casings and a very active competitor of duPont polyethylene film.

The COURT. Was that the man who wanted to make a million dollars who was the head of that, Freund?

Mr. GESELL. Freund was his name. He, you will recall, was dead. We could not call him to the stand, Your Honor; much to my regret, but we did have in evidence a letter that he wrote his friend, Judge Frank, in the Second Circuit. Judge Frank was interested in writing up about patents, and Freund had written him in response to his request a full account of his relations with duPont, and that is in evidence.

I take this charge about Visking with a considerable grain of salt because I cannot conceive that the Government is
10597 advancing it except to add to its list of companies because the facts are so diametrically opposite to the charge of suppression of a potential competitor. I want to put your focus on the date here, Your Honor. The events took place back in 1923 and '24, and '25. They took place at a time when duPont was not even in the cellophane business, and they took place at a time, of course, when Mr. Freund was not in any business whatsoever.

This excluded manufacturer that they talk about was a very interesting fellow. His parents had been in the stockyard and slaughter business in Chicago and he had gotten interested in whether he couldn't make some form of synthetic sausage casing. He had worked and worked and worked at that, with very little money, with tremendous courage and tenacity, and he, Your Honor, was literally the small inventor with the big idea. His plant, so-called, was a toilet in a warehouse, and an abandoned one at that, and he was literally experimenting on a pot and pan basis, with some assistance from a technical institute in Pennsylvania. And what happened? duPont acquired the so-called Cohoe patent, a basic patent, and it acquired that patent because that patent claimed glycerine as a softener and therefore was important to the manufacturer of cellophane, and so it had the patent. And Freund, as his program for manufacturing sausage casings came along and he thought maybe he could get some money and get started, found that here was this basic patent owned by
duPont which read right on his program, and if he didn't
10598 have a license under it, his whole development would be useless, as the evidence shows—Mr. Weigland, his technical man, so stated—his whole development would be useless, because here was this basic patent, and he had been working all this time.

Now, Mr. Minicus says that he was already set up as a manufacturer of regenerated cellulose with all the necessary skills and know-how. And, of course, he was nothing of the sort. He was experimenting in an abandoned toilet in a warehouse. What

would you expect to happen in a situation of that kind if what he was dealing with was a monopolist? Incidentally, he was dealing with someone who was hardly in the business themselves, just negotiating the license with the French. Well, what did this record show? Not that he was a potential competitor. He had no desire to go into cellophane. He had no facilities to go into cellophane. He wanted to make his sausage casing.

Well, what did duPont do? duPont gave cash by contributing essential money to the formation of a corporation to make the sausage casing. It gave management guidance. It gave technical assistance and substantial know-how, and it gave him three valid patents which were essential to his carrying on his work. And so by management, money, technical assistance and patents, which we contributed to his company in return for a stock interest in it so that he could go ahead and make sausage casings, we are pictured in some way as having subjugated a potential com-
10599 petitor. Mr Freund called it the most fortunate event in his life and said that he made all the demands and duPont acceded to them. It is hardly a picture of monopoly rampant. And from that beginning his business grew and we continued to assist him and we licensed him technology and patents, saying only, "You must not use these to make cellophane." There is no indication that he ever wanted to, ever desired to; he wanted to make sausage casings where he had spent his life, and the contract was framed in accordance with his demands—nothing improper about the contract at all. And he would never even have been in business were it not for duPont's cash, its patents, its management assistance—and all of this, mind you, was in the early Twenties when the question of sausage casing or cellophane, for that matter, was simply a gleam in these peoples' eye and a hope they could do something about it. I take it that is not evidence of a concern with the capacity or the desire to go into the cellophane business.

As time went on and the patents expired and he became self-sufficient on his own technical feet, the agreement was cancelled and the stock was sold, and they were completely on their own. They have gone into polyethylene; they are expanding in sausage casing. There is no agreement or arrangement of any kind with them that keeps them out of cellophane, nothing incident to the cancellation or otherwise that said they couldn't go into it. So I say again, there is no evidence——

The COURT. Well, didn't you offer in the Forties to
10600 assist them in going into cellophane?

Mr. GESELL. Your Honor may have this in mind. When duPont offered generally to license, Visking was one of the companies that made inquiries. They lost interest and did not go

forward. Other companies did. That was in response to the general advertisement given to the availability of duPont's patents and technology, Your Honor, and not any specific thing done in relation to Visking at all. They were simply one of the companies that inquired of, I guess, several score of people. And they did not go forward.

Certainly, Your Honor, we can contrast the evidence as to these potential competitors—and I have named the only ones as to which there is any evidence of any consequence, other than the foreigners, which I am going to come to in a minute——

The COURT. We had ten at the pretrial conference.

Mr. GESELL. Yes, a lot of them were dropped.

The COURT. We have covered American Viscose, Visking and Rayonier. This is on page 60 of your brief. Which have we dropped?

Mr. GESELL. Well, these are the ones that remains. Of the ten that were listed, you will notice we say there that there are six of these as to which there aren't any facts. They dropped Skenandoa, for example. We called a witness from Skenandoa. When they heard the witness was coming, they dropped it as an excluded competitor. There was no evidence they were

10601 excluded, and that was dropped.

Marathon, Goodyear, Eastman, Monsanto, are all cases, I gather, on which the sole evidence on which they rest is the settlement of interferences. They were companies that were parties to interferences, except for Marathon Corporation. Goodyear, Eastman, and Monsanto were all involved in interferences. Marathon we discussed the other day. I called your Honor's attention to the fact that a witness from Marathon testified that Marathon had no desire or interest in going into the manufacture of cellophane. They make cheese wraps out in Wisconsin. The testimony of Mr. Croy is covered in our findings and appears at page 23 and again at page 54 of the deposition. They never had any desire to make moisture-proof cellophane.

Goodyear, Eastman, and Monsanto were involved in settlement of interferences, which had nothing to do with keeping them out of the cellophane business whatsoever.

I think the only cases on which there is any genuine issue at all, as we see it, are American Viscose, Visking and Rayonier. Carbide, you will remember, the pitch was changed after Mr. Davidson took the stand, and it was said, no, they weren't really an excluded potential competitor; it was simply that while we thought that they might be going to make a product which we thought was cellophane, we took steps to try to persuade them not to go into the business. There was no agreement or ar-

rangement of any kind with Carbide affecting their right
10602 to go into the business, and I think if you will remember the peppery Dr. Davidson, you will recall that he didn't look very much like a fellow who had been potentially kept out of anything. That was a case where we helped them by working with them to see if this product they had was any good, and we decided it wasn't, and they peddled it all over the country to four or five other substantial people, all of whom looked at it and said it was no good either and they never did make it except incidentally to their other operations. It wasn't cellophane; it was like cellophane. So they are not really a potential competitor. There was a settlement of an interference with them, Your Honor may recall, and Dr. Davidson testified that interference had no limiting effect upon their ability or desire to go into the cellophane business.

So that actually—I am sure that the Government will not agree—but it does seem to me on looking at the evidence that American Viscose, Visking and the Rayonier situation are the only ones that offer any kind of tangible evidence with which Your Honor will want to be concerned.

Now, of course, and I think Mr. Minicus quite rightly pointed out, I did not include here in the brief the foreign manufacturers that he listed on pretrial, and I intend to talk about them, Your Honor, but we are talking about the domestic group. In all of the interference situations it is our view of the evidence
10603 that what happened was an arms length settling of an interference declared by the Patent Office in accordance with a negotiated settlement on specific inventions. None of the inventions of Monsanto or Goodyear or Eastman, for example, the three that are involved there, was shown to have any consequence in the cellophane art as such. They were inventions that read on cellophane in one way or another because of the interest of these companies in other materials and other activities, and the basis of the settlement gave them no rights in those inventions as to cellophane, and it seems pretty clear that, if the interferences had been litigated, the same results would have flowed. So that I don't feel that there is any evidence there of a desire on the part of the companies to go into business, or on the other hand, of any action taken by duPont to prevent them from going into it. We had a witness from Goodyear, Mr. Ellies, who testified, for example, they never were interested in going into the business. So that I don't think we have any but those three cases, and as I have reviewed them, there is no evidence at all as to American Viscose of any action taken to exclude them. The contracts as to Visking and Rayonier prevented each of those companies from using technology which duPont gave them for other purposes for going into

the cellophane business, but they were not otherwise precluded, and it is our view that both of those licenses were ancillary to a very legitimate proper business purpose, were lawful, and did not constitute exclusion of potential competitors, particularly
10604 since neither of these people desired and certainly one of them did not even have the capacity to go into the business.

I have covered the two new cases also, Your Honor, that are not in this pretrial list, they are both cap and band cases, in my argument, Armstrong and Schnier, both of whom said they had no interest in it and were not excluded.

Now, if I may, I would like to turn to the question of imports and the exclusion of foreign manufacturers, which is a related aspect of this whole exclusion situation. Before I get into the foreign ramifications, Your Honor may wish to take your mid-afternoon recess a little earlier.

The COURT. Yes, we will take a five-minute recess.

(At this point a brief recess was taken.)

10605 Mr. GESELL. For the rest of the afternoon, your Honor—and I would like to stop when I finish this subject if I finish before three-thirty—I would like to deal with the question of foreign exclusion, so-called.

Now, that falls under two headings, and I would like to take up the imports first, the exclusion of imports, and give you some background on that, and then deal with the exclusion of foreigners from manufacturing here.

The COURT. Can you key that to your index in the brief?

Mr. GESELL. We have discussed the basic agreements in the section called "Origin of duPont's Business Was Lawful," at page 95, and that discusses the basic contract, and the foreign aspects of the case. We have dealt, of course, in more detail with it in the findings.

For just a moment on caps and bands, before we entered the business, your Honor, there was a 60 percent ad valorem tariff, and there still is. No bands have ever come into the United States as far as any evidence shows at any time until there was some need for imports apparently at least under consideration during the war for airplane manufacture.

Now, as far as cellophane is concerned there has been a high tariff since 1922. Pre 1930 it was 40 cents a pound, and
10606 after 1930 until very recently there was a 45 per cent ad valorem tariff.

Now, your Honor asked whether there was any evidence as to foreign costs, and there is evidence. In fact, there is considerable evidence. The evidence is that foreign made cellophane cost more to make abroad and was high priced. GX-88, for example, shows

that British cellophane was from 10 to 25 per cent higher priced than American made cellophane. The evidence shows that in 1950 cellophane made abroad in England was 52 cents, and adding 30 cents for the duty gave it an 82-cent price against competition with duPont's 48-cent price.

Now, there were a lot of reasons why imports should not take place. To a degree in some cases they were undoubtedly affected by the patent and they were affected by the license agreements which I am going to mention. But during this entire period, your Honor, there were various imports taking place from foreign countries—from France every year from 1930 to 1940 and again 1946 to 1948; from Germany every year from 1930 to 1937, and again 1948 and 1949; from Holland every year from 1932 to 1940; from Belgium every year from 1930 to 1932 and then, of course, Sidac made a contract with Sylvania; from Canada from 1933 to 1949, 1935, 1943, and 1945; and Japan from 1934 to 1942 and again in 1949.

Now, the question arises Why were these imports not larger? There are several reasons apart from the tariff, 10607 which is of course always present. Moistureproof cellophane could not be lawfully imported into this country, your Honor, as long as the patent was extant. In addition, there is testimony that the foreign made cellophane was high priced, was of low quality, was offered without any technical service, that there were frequent price changes between order and delivery date, a poor and unpredictable delivery schedule, no real development of moistureproof to meet the high standards of the mass packaging markets, and so forth.

In the case of the Japs where they were selling handmade sheets, the evidence shows that when those sheets were tried they were found to be of poor quality and usually the customer returned to duPont.

In addition to the tariff obstacle it is clear that this foreign made cellophane did not meet American standards as to price, as to quality, as to service; and, of course, with the patent on top of that it was perfectly clear why it should not come in. I really don't think that duPont should be criticised because of the tariff, your Honor. That Smoot-Hawley tariff was put in, and Birn & Wachenheim, the importer involved, appeared, as the record shows, and protested the tariff, and the tariff was put in any event. It was part of a reflection of the general tariff situation at that time.

We put on the stand Mr. Goland, your Honor. You did 10608 not see him. He was one of the deponents. He had been a European converter and he knew about this foreign made

cellophane because he had handled it and he worked it, and he tried to use some after he came to this country, and he was able to compare it with the conditions in this country, and he testified explicitly to these differences in price and in quality and in service which I mentioned, as well, of course, as in cost.

Now, as I understood the argument yesterday, we were said to have excluded these imports because of a price policy. We were specifically charged with having reduced our prices during a period of exorbitant profits to shut out imports. Well now, what does the evidence show? It shows that in the early days, your Honor, before duPont got into the manufacture of cellophane and shortly after it got into the manufacture of cellophane there was importation of cellophane into this country and that the importers were selling in this country at a lower price than duPont after going over the tariff wall and here was duPont meeting that competition, the importers about five per cent under it, and here was duPont with its costs dropping, its capacity rising, and it was getting over the early high cost hurdles of getting into this business, and wanted to expand for the purpose of getting new uses, and the documents show that in order to compete with the importers we reduced the price first to meet them and later below them; and as that took place and the tariff operated they 10609 were excluded.

Now, that is not an indication of the elimination of a potential competitor by a predatory act. This is not a case, your Honor, where the price was reduced to drive these people from the business and then increased again, which is the typical monopolistic pattern. This is a straightforward case of a long range program for price reduction in order to develop new uses which had as one of its purposes to compete with the importers and which resulted in making it far more difficult for them to sell with the imposition of the tariff barrier. That is not the exclusion of a potential competitor. Surely it would not be said from the Government table that we are under some obligation not to meet the price of a competitor, or surely it would not be said that we must keep our prices always at what they themselves call exorbitant profits in order to permit import competition. It was the most normal and natural thing to do to meet the prices of these people selling in this market, and then as our price continued to decline and our markets to expand, their position was made such with the tariff that they could not compete, particularly because they were high cost and poor quality, no service, because they had to buck the moistureproof patent, and they dropped from the market; and I say there is no evidence on those facts upon which anyone can charge that importers were eliminated.

10610 Now I would like to turn to the general question of our relations with these foreign manufacturers and see if I can develop what I understand to be the Government's position in relation to this evidence and put the facts into some kind of perspective.

The basic contract which duPont made with La Cellophane is the full agreement. Your Honor has read it. It was entered into with the advice of counsel on both sides, and the contract is clear. There isn't any question that at the time it was entered into anyone else was considering going into this business. There isn't any question that there had been a previous successful partnership between the French and duPont, that it was natural that they would want to join together in this venture, that duPont had the interest and the money, and the French had the process and some experience with the product, and that this business started out on what seems to me still to be the only logical, normal way in which it could have started out—joining together with the French here to manufacture, and that is all your Honor will notice was represented as being an act excluding La Cellophane from this market when, in fact, they went on the board and had a stock interest and were manufacturing here with duPont in a joint business. They were not excluded. They came here. They came here under terms that Mr. Carpenter and others testified to very clearly were imposed by the French as the price of getting this process, and now from a glorious point of hindsight many
10611 years later the Government says the whole purpose of this was to divide world markets. Well, what world markets are they talking about, your Honor? How could that be the purpose? There was no business here. Nobody had made this product. It was new and untried in the American markets. The amount of exports from France were minor. The French joined with us in a business here, to pioneer a business here, and they had a process which was essential, and the evidence is explicit from Mr. Yerkes and from Mr. Carpenter and from documents that the reason we went to the French was to get the process. We wanted to go into the business and we went to them to get the process. The primary purpose was to set up this business and to go forward with it. We wanted the protection of an exclusive license. The French were unwilling to give us world wide rights to their process, and so the agreement took the form of an exclusive license with territorial limitations upon the use of the process—a most normal, natural kind of agreement to enter into, and the only way that an agreement could have been drawn which had any logic as a business matter to carry out the purpose of initiating this venture. No one else was trying to get this process;

no one else had, if you will, the vision to see its potentialities, and it was not the cellophane business of today, but a struggling sheet cellophane business which the French had used as a luxury wrap for perfume bottles.

10612 Now, the Government says there was no secret process and that the whole agreement was a camouflage, that duPont put up the money, that it executed these contracts, that it went through these negotiations all with the idea of deceiving your Honor or someone else who would be called to judge its conduct at the time. Now, that is absurd on its face. What does the evidence show? We have written documentary evidence of the process itself; we have the testimony of an employee of La Cellophane; we have the testimony of the then duPont technical director; we have the testimony of Mr. Yerkes who was responsible for the operations of the plant; and we have the testimony of Mr. Carpenter with respect to the company policy and motives at the time. It is all clear that the purpose of this entire venture and the dominant motif was to obtain this process.

What was the situation? It was a process that the French had developed, that they had kept secret in their plants. It was a commercially workable process developed by a very ingenious inventor who had labored on it long and hard—Brandenberg. It was communicated to duPont in confidence. It was a going commercial process. The French trained our personnel. They gave us the specifications for the plant. They gave us the drawings and the design of the machinery. They manufactured the crucial hopper for us themselves in their own plants. Years of trial and error by which they had learned complicated

10613 chemical formulas with respect to viscose content and other specifications and the composition of the baths were given to us. All of the secret mechanical bits of know-how in their entire production line from viscose on through was provided. This was not in the public domain. It was essential to manufacture. Dr. Benger testified that for us to have attempted to gain this information would have taken us from five to eight years and would have involved an expenditure of from $800,000 to $1,000,000 or upward, and this is what duPont obtained. It was taught to us by their technicians who came here, who helped us build the plant. The inventor himself was here when the machine started to roll and supervised the plant at the beginning.

10614 If Your Honor needs any more evidence of its importance and its secrecy, consider, if you will, for a moment, what happened. This was so valuable that two dishonest employees of La Cellophane stole it, departed for Belgium, formed the great Sidac company on the basis of it, came over here and set up Syl-

vania and, when they were caught, paid reparations to La Cellophane for their piracy. You couldn't have a more acid test.

All of the elements of a secret process and trade secret, if Your Honor please, are present here. It was disclosed only to those having confidential relations. It was described in confidential terms when disclosed. It wasn't discovered and published by others. It wasn't generally known in the trade. It wasn't disclosed in the issued patents. It had a clear degree of inventiveness and of scientific character. Some of it was patentable and later was patented. It had novelty, entirely different in important commercial respects from anything that was then known. It promoted economy and efficiency in the manufacture of the product. It had a clear commercial value of a specified character. It gave advantage over others. It was reduced to writing and it was carefully guarded. Your Honor, I cannot conceive of proof which would be more explicit and complete than that which we have.

Your Honor said in the Warren Petroleum case that a trade secret may consist of a formula, a patent, a device, a plan or a compilation of information which may be used in one's business
10615 and which gives a person an opportunity over a competitor; it must be novel but not necessarily of the degree of invention to be patentable. That is the rule. That is the rule in the Restatement of Torts. It has been the rule since Peabody v. Norfolk and Fowle v. Park, and there isn't any question that then or now the disclosure of such information could be made subject to reasonable ancillary conditions upon its use either territorial, financial or otherwise.

To use the analogy of yesterday, the seller of this business was La Cellophane, who made it available to us for a price, and who circumscribed its use as a concomitant to the licensing and as part of the definition of the scope of the joint venture that was then being started. Now, there is nothing to that that I can see which supports the claim that it was all camouflage, that all these trips and all this work with these inventors was merely somehow or other designed to conceal or deceive, and that there was nothing genuine or of substance for which duPont paid money and issued stock. This was a genuine process and trade secret of great value and duPont obtained it under lawful and proper conditions.

From that, Your Honor, necessarily flows these agreements which the Government criticizes. And if this process is a proper process on which to base the contract, of course, their contentions must fall.

They like to liken this case to three cases. They say it is comparable to National Lead, General Electric, and I. C. I.
10616 Well, it is not. In the National Lead case the court found that National Lead and the foreign associates who made

the agreements there in issue made an out-and-out commercial covenant in Article IX, I believe it was, of the contract, by which they agreed for all time not to compete in any market of the world without regard to the nature or the scope of the processes or products being licensed. There was not in that case any proof of genuine secret processes underlying those agreements that National Lead had made. So it isn't like the National Lead case.

The COURT. Weren't there other defendants than National Lead?

Mr. GESELL. duPont was a defendant, not so much on the foreign aspect as its domestic licensing agreement with National Lead in this country.

The COURT. Were you in that case?

Mr. GESELL. Yes. I represent duPont.

In the General Electric case, your Honor, the situation was this: Various restrictive provisions had been placed in the General Electric licensing scheme based upon know-how. The proof, apart from some general testimony as the court found, was a photograph which counsel for General Electric brought in of a pile of documents and said, that is the secret information. Well,

that isn't this case. And the proof fell down in the Gen-
10617 eral Electric case. They were not able to show the substance of a process of this kind.

The I. C. I. Case, Your Honor, is not like this case. As Your Honor is aware, I have just come through that ordeal. In the I. C. I. case, Judge Ryan found that apart from any patents or process arrangements between duPont and I. C. I., there had been of long standing, going back to the year 1897, a broad agreement between I. C. I. and duPont that they would not compete with each other in world markets and that these particular agreements which were before the court were merely ways and means of carrying out a broad overall commercial understanding.

In all of those cases then the court found—rightly or wrongly I cannot complain—broad commercial understandings based on explicit evidence showing commercial arrangements far beyond the confines of any secret process shown.

Here quite the contrary is the case. This process goes to the very heart of this entire production, and I have recited to you the facts with respect to its importance and its significance which I say justify the basic agreement.

But I think we can go one step further, Your Honor, in dealing with this issue in the base, and it is admittedly a troublesome one. My suggestion about it is this: The agreement has long since passed. We are litigating a monopoly question. The issue that I see here is, what did this agreement have as an effect—what was its effect upon duPont's position in the United States? I think

10618 that is the way the Government views it because at least on argument they spoke of this agreement as being important on the issue of exclusion of competitors and nothing else, this being a monopoly case. You are not required to adjudicate the abstract question of the legality of the agreement. You can deal with its relation to this case in terms of its effects. And if it appear, as I think it does, that this did not appreciably or materially affect duPont's position as a manufacturer of cellophane in the United States, then its pertinence to this monopoly case is very slight. First of all, we have to recognize that by 1929, with the invention of the moisture-proof product which I discussed this morning, there was given to duPont the lawful right, apart from any agreement, arrangement, or anything else, to exclude for the life of that patent any moisture-proof cellophane from the United States. It was under no obligation to license that patent to any foreign manufacturer. The United States patent was not involved in the agreements, and it stood there as a bar, under the Bosch case and many others, to any importation of cellophane of the moisture-proof type from abroad.

Second, we have the tariff, and I have pointed out to Your Honor a moment ago the various factors, quite apart from any agreement, which have prevented the importation into this country of cellophane made by the various producers abroad.

Now, finally, I would like to point out that this did not in 10619 quite such a complete way as the Government likes to suggest keep foreigners from manufacturing here. Certainly La Cellophane manufactured here, in conjunction with duPont. Certainly there is no indication that either BCL or Kalle, the other two parties to the license contracts, had any desire to manufacture here. They had no rights to do so from La Cellophane quite apart from any question of their arrangements with duPont. The moisture-proof patent acted as a bar to them. BCL didn't even get started in the business until after the moisture-proof patent had been issued. And there is no showing that the British or the Germans ever wanted to come here.

I think that that situation is one of the factors that had led the Government to try in every way they can to broaden this picture in an effort to show that there was some kind of other or further agreement which kept foreign manufacturers from this market. And they talked to you at great length about it yesterday. It is their so-called agreement or non-agreement cartel—I am not sure which they call it. It is the cartel not based on the license agreements but based upon the alleged results of the meeting which took place in Europe. I want to deal with that because it is our contention that there was no understanding other than these specific license arrangements, and that none of these discussions

which took place abroad involving a convention or a cartel ever brought duPont into such an arrangement, and I was rather shocked to hear the suggestion yesterday made that the [illegible] testimony which was given on that subject was inconsistent with the documents. I think it therefore important to mention one or two of the documents before turning to the testimony.

In 1932 we have a Government exhibit, GX-1022, April 1, 1932, written by La Cellophane, and under a heading called "Open Markets Without Price Agreement," La Cellophane has this to say: "Owing to the fact that you preferred not to join the convention, we could not keep Wolff and Sidac away from your markets, i. e., the United States, Canada, et cetera, as they would not get anything in return, whereas ours would, of course, as in the past refrain from selling in your territory."

Under the heading "Cuba" it says, "Cuba, being situated north of the Panama Canal, belonging thus to your territory—" that is, the licensed territory that duPont had—"Wolff & Company are quite free to fix their selling prices and enter into open competition with yourself."

You will recall that Your Honor asked whether the map was available that was referred to in that letter, and I tendered it to the Government, and it showed a great white area for duPont labeled "Open Markets Without Price Agreement" and the Government never even offered it in evidence.

Now, how can you, on the basis of that contemporaneous document, written after these negotiations are supposed to have committed us to a convention and a cartel persist in saying that we are a member when the leading architect of it, the leading authority, says, "Owing to the fact that you preferred not to join we can't keep these people away from your markets."

And when our witnesses testified, we never joined any cartel, we never had any authority to join any cartel, how can the Government say that you must disregard that because it is inconsistent with the documentation? It is consistent with the express statement written at the time by La Cellophane.

What did Mr. May mean when he wrote in 1934, referring to La Cellophane's efforts with respect to a convention or cartel in those days, that they never were able to get together over there, the whole thing was based upon some fancy European consortium that never worked out? Does that sound like a man who had joined a cartel? I say to Your Honor that the documents confirm the testimony. Certainly a document that says, "We are free to pursue our only policy of sales in South America, Japan, and China" is inconsistent with any suggestion that the contrary

was the case and that quotas and prices existed in those markets.

10621A The evidence was very clear from Mr. Swint that he attended this meeting—Mr. Pickard was dead; we couldn't call him—Mr. Swint attended the meeting. It lasted two days. He attended only one day. Mr. Minicus said to you yesterday, duPont says in its brief Mr. Swint didn't listen the second day. That isn't what the evidence says. The evidence says he only attended one day. And secondly, duPont did not sign the convention arrangement. And thirdly, Mr. Swint said he had no authority to make any such arrangement. And fourthly, he said he never did. And Mr. Yerkes and Mr. Carpenter and other witnesses who took the stand said duPont never became a member. Mr. Yerkes said duPont never became a member and he never authorized La Cellophane to act for it. And they didn't even cross-examine him about it.

Then we saw a very amazing thing yesterday. Mr. May went over to negotiate reparations, your Honor will recall, in 1930, because the agreement between duPont and La Cellophane had been violated when Sylvania was set up with the French know-how over here by Sidac. Your Honor recalls how that went around the circle. And we went over to see the French to get reparations from them for this violation of our contractual rights, and Mr. May signed a document which set forth the terms of an agreement which he had negotiated, and at the bottom of that document, Exhibit 1013, it says, all of the above is subject to the ap-

10622 proval of our board of directors. And then he came over here, the board met, the agreement was changed, it was submitted to the French in its different form, Exhibit 1015, signed by the French, whose representatives participated in the board meeting here as directors of the duPont Cellophane Company, and the suggestion was made to your Honor that that was all mumbo-jumbo, to conceal something, and that Mr. May, when he said, "I make this arrangement subject to my board," really didn't mean that, that he made an agreement though he had no authority to do so, and that when the board changed it, they really weren't doing that; they were simply entering into some paper writing.

Now, that is not supported by the testimony of Mr. Swint; it is not supported by the testimony of Mr. Carpenter or the other participants, and it just isn't so. We never joined any foreign arrangement to keep foreigners out of this market. Our sole relations were based upon these license agreements which had a legitimate and proper motive and reason, not an anti-competitive one, but a straightforward business one, of getting us into this business.

That, I think, your Honor, covers what I want to do today unless your Honor has some questions about this aspect of the case.

The COURT. No. We will adjourn until ten o'clock tomorrow.

(At this point the trial was adjourned until Thursday, January 8, 1953, at 10:00 o'clock a. m.)

10623 THURSDAY, JANUARY 8, 1953, TEN O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. This morning, if your Honor please, I would like to continue my discussion of monopoly power and market control. Yesterday a good deal of the time was concerned with the first of the two powers, the power to exclude competitors when it is desired to do so. Today what I would like to do in the morning is deal with the second, the more important, perhaps the crucial power—the power over price. It is the power, I remind the Court, which the Government concedes is an essential element of their case, the power to raise price or, as they like to put it, the power to manipulate price. The issue is simply this, and again, if your Honor please, it is a fact issue: Does duPont as to cellophane have the power to raise price without substantial regard for competitive factors? Or as the Government likes to put it, Does it have power to raise or lower prices unreasonably?

Now, I have called this the most important power, and the cases have so recognized it, and I think the reason is pretty clear. Power to fix a price, of course, is power to create a per se violation of the act, and the whole objective of the monopoly statute is to prevent a seller from being in a position to impose price. If he does
10624 it by agreement or collusive action, why, obviously, the consumer has been injured, and the per se violation exists; and if he has the economic power to do if by himself, many of the same results apply. So that this power over price is a crucial element of a monopolization case.

The COURT. Turn to page 42 of the Government's proposed findings. Do you have it there?

Mr. GESELL. Yes, your Honor.

The COURT. Those citations at the end of each proposed finding, that is the testimony of what person?

Mr. GESELL. Well, mostly it is not testimony, your Honor, at all, unless you call it Mr. Minicus' testimony. I think practically all of that is his argument to the Court.

The COURT. I see.

Mr. GESELL. What I am going to do, if I may, this afternoon I want to devote the afternoon to this document.

The COURT. Very well. Proceed.

Mr. GESELL. I propose to go down it chapter and verse to show you how it is constructed, what its deficiencies are, what its incon-

sistencies are, what its inaccuracies are, and to show you what a flimsy piece of document it is. But I would like this morning to continue the discussion of power as it relates to price.

The COURT: So that to follow your argument I will put this aside.

10625 Mr. GESELL: Yes, your Honor.

What I want to put over at this point is that unless the Government can show that we have the power to raise or lower price unreasonably without substantial regard for competitive factors in the market place, they have not shown that we have a monopoly. It is essential to their proof that this power be present, and we say we do not have that power. We cannot as a sole producer can, absent facts as to competition of other materials, lower or raise the price at will. We are circumscribed in our price power by the competition in the market. We can neither raise it nor lower it unreasonably without regard to competitive factors in that market, and therefore we do not have the power, the market control, the position of dominance, whatever phrase you want to use, which monopoly implies of being able to control our price; and that is a crucial fact. It is not a law issue, your Honor. It is a fact issue. They must show as a matter of fact that we have that power, and the whole thrust of my argument this morning is going to be to show your Honor that they have failed in that second crucial element of their proof.

Now, obviously, as Mr. Minicus himself recognized on the argument, this is a matter of degree. We don't say that they must show that we can raise or lower price completely to any level up or down. Nor is it an offense if we have some measure

10626 of control over our price, which rests in every seller from the candy counter downstairs on up, the right of any seller within reasonable competitive limits to fix the price at which he is going to sell or attempt to sell. The test is Are we able to act as to price without substantial regard for competitive factors and in an unreasonable manner? and we say we are without that power; that the competition in the market place circumscribes our power over price to a very narrow degree; that the competition from the other cellophane producers and from the producers of directly competing materials makes it impossible; that if we raise price we lose business, and that we must keep our price low to compete.

Now, all the market evidence that your Honor has heard, relevant as it is to other issues in the case such as intent, is directly relevant and pertinent to this fundamental, crucial, central issue of any monopoly case—power over price—and when the proof of the competition of these other materials came into this case it came in under a ruling from your Honor that such inter-product

competition was relevant to the issue of power; and what I propose to show you today is how that evidence as it now stacks up explicitly shows the absence of the power which the Government, again on theory, asserts we must have because of what they like to call 75 per cent, but which is actually 68 per cent if you are talking cellophane, and 20 per cent if you are talking the market in which cellophane is sold.

10627 In the first place, your Honor, the cases speak of this power as the power to raise price. I say frankly to you I doubt that that is the sole measure of it. But certainly if that is the measure, if raising price is the question, we have never exercised the power, because we have never raised price.

THE COURT. I have been probing my recollection as to the evidence and I remember occasions when there were discussions about lowering price. Can you point to any part in the record where there was an incident about raising price?

Mr. GESELL. There was no incident about raising prices, and no raising of prices until the latter day period after OPA control went off, when prices of all flexible packaging materials rose in response to the costs and inflationary conditions in the market.

But we say that even then, your Honor, while cellophane did go up, it in fact went down, because the relative spread between the cellophane price and the price of the other materials narrowed, and that, of course, is the test of whether our price is up or down. We did not raise the price even at that time as early or as substantially as did the manufacturers of other materials, and you will recall at that time generally the economic conditions in the country led to price increases throughout the chemical industry and many other lines. But all during the period

10628 that Mr. Minicus was talking about in his argument there was not any raising of price.

In addition, in this pre-war period, Your Honor, which your question I believe was primarily directed to, the price of cellophane was constantly coming nearer and nearer to the price of the other materials so that both relatively and absolutely it was lowering.

The second fact is this on this question of power, Your Honor. There is no jiggling of prices here. There is no evidence that within our general program for lowering price a particular price was set momentarily or for a short period or in a certain area of the business or some anti-competitive or indeed any purpose. We never lowered the price to knock someone out of the market or to change the distribution pattern or something of that sort, and then put it up again having accomplished an anti-competitive purpose. These prices consistently followed a downward trend.

Now, may I, Your Honor, for a moment refer to the decisions

to indicate what the judges have meant when they talked about power to control price——

The COURT. Before you get into that, may I ask this one question, because I have some difficulty I want cleared in my mind. Is there anything in the record to show that Sylvania felt the impact of the defendant lowering its prices?

Mr. GESELL. No, if you mean felt it unfavorably——

The COURT. Yes.

Mr. GESELL. There is nothing. There is evidence 10629 the other way, that their business expanded as their price came down to meet duPont's and that they benefited by those price reductions. That is in evidence that was introduced by Mr. Minicus in several places during the trial and there is no indication that those price decreases subjected them to any competitive handicap. I am going to come and talk about that more. But it is clear on the evidence that they did not injure Sylvania.

Let's look at the cases, if I may, for just a moment, Your Honor, because I think they show the terrific difference between this case, where the claim is made on the basis of 75 per cent, which is really 68, that we have a power, and what it has meant in cases where the power over price has been found and has been proven.

The Reading cases were the early cases and they are very interesting cases. They are cited in our brief. Here were concerns engaged in the coal business, and they were worried about competition from other coal manufacturers and so they set about it and they cornered all of the means of transportation from the coal fields to the markets, and then as the price for permitting the coal competitors to ship over their railroads they forced these independents to charge the same price as they were charging for their coal. Now, that is power over price, and that is the kind of things the courts are talking about.

Take the Alcoa case, which we hear so much about. 10630 There the Alcoa Company engaged in an explicit illegal price squeeze in order to prevent competition from the fabricators by setting prices of ingot and sheet in such a manner that the fabricators could not compete with them except in the amount and to the degree that Alcoa decided it was willing to permit at the particular moment.

Then in the case like the Tobacco case, all the principal big tobacco companies got together by an agreement and developed a price policy directed specifically against the people who were attempting to sell cigarettes at a lower price. Then the cases have involved substantial arbitrary resale price control situations. We are not interested in that kind of a case or that kind of an area.

We started out, if Your Honor will recall, that all of the cellophane prices were collusive and set by agreement between duPont

and Sylvania; and of course the Government was proceeding there under a total misapprehension. Some bright young man had looked at the price lists and found that the prices were the same, had the same date on them, and reached the conclusion that there was something wrong, and so a complaint was drawn. But when they put a witness on the stand—and he was their witness, not ours Your Honor—it was perfectly clear from his testimony that the prices were not collusive, that the Sylvania price lists were back-dated, that they picked up duPont's price lists in the open
10631 market and printed in a hurry in an effort to be competitive.

And the testimony of official after official in American Viscose, Sylvania and duPont has demonstrated the absence of any price collusion or price agreement.

We have a case, if you will, of what the Government likes to call price leadership, but it was made perfectly clear by Judge Knox in the Aluminum case and by the Steel case as early as 251 U. S. that price leadership does not establish monopoly power over price and that price leadership or price identity, as was said in the Cement case in 268 U. S., may be just as much an earmark of intense competition as it is a monopoly.

So we have to go beyond the cases to come to any conclusion in this case that there is monopoly power.

Now, if I may, Your Honor, I would like to present to the Court the facts in this record which demonstrate the absence of any power over price in this case. It is affirmatively shown, we contend, that price control, price power, is absent.

I do not intend to review here all the welter of proof about the competition between cellophane, wax paper, glassine, Pliofilm, acetate, and all the other products with which Your Honor is familiar. We have had such a full and ample opportunity to argue those facts and discuss those facts with the Court time
10632 and time again, Your Honor has heard the witnesses, you have been to the packaging show, you have seen the physical samples here in court, and I do not intend, particularly since our findings have covered it in most elaborate and explicit detail, to discuss each and every element of this market proof as it has come in, the proof from the converters, the proof from the small and the large manufacturers, and from the users, the market surveys, the trade association reports, and all the other proof that is here of record.

What I do want to do is talk specifically to the proof in terms of how it relates to duPont's power over price, and I say to Your Honor there is no law issue here, there is a fact issue, and a fact issue only.

The COURT. It seems to me that my field of examination on this

point is a very narrow one because I have only got to look at du Pont in relation to Sylvania and Celon.

Mr. GESELL. Oh, no, Your Honor.

The COURT. Broader than that?

Mr. GESELL. Oh, much, yes. That is the whole gravemen of my argument this morning—much, much more. Let's see if I can illustrate what I have in mind. Suppose, as our proof shows——

The COURT. Well, they are the only two people who can feel the effect of any control on prices in so far as restraint on competition is concerned.

Mr. GESELL. From that point of view, perhaps yes,
10633 Your Honor. But that is not the test of our power. What we can do as to cellophane is determined by the market conditions in which cellophane is sold and if the competition in that market from Celon and Sylvania and those companies, and from the manufacturers and suppliers of these other materials is such that it denies us the power to manipulate price, if you will, as we might be able to do given just Sylvania, duPont and Celon, then those market facts impinge on our power, they circumscribe our power and they prevent the exercise of the power.

The COURT. What I meant by my question was this: I am accepting the thesis of the Government for the purposes of my interrogation. They are not interested in these other substitute products. So that according to their tenets, it is only Celon or Sylvania that could be affected, as I see it.

Mr. GESELL. That is right.

The COURT. That is what prompted me to ask you that question. Now, you say, in addition to that, you want to go into this other field according to your theory of the case.

Mr. GESELL. No. I am willing to take it on the Government's theory to this degree, that if Your Honor chose to say that in analyzing duPont's price power I am concerned only with its power to use price against Sylvania or against Celon, I won't quarrel with that. But I say in determining the strength of
10634 our power against Sylvania or against Celon, you must take into account the market factors which prevent us from operating without regard to those competitive influences.

The COURT. I see your point.

Mr. GESELL. In other words, that is our whole distinction with the Government on this basic power issue. The Government says you can draw some kind of imaginary line around duPont, Sylvania, and Celon and then, on some notion of legal relevancy, push everything else out and then say, "Look, it is 75 per cent, and from 75 per cent you must assume that this great big company can do a lot of things to these little companies." Well now, if the

big company is operating in a large competitive market where other materials affect its pricing policies, then the big company isn't in the theoretical position they talk about; it is in a different position.

Let us go back to a question Your Honor asked a moment ago. You asked, what was the effect of these price declines on Sylvania? Well, let us suppose for a moment that those price declines injured Sylvania. I told Your Honor they did not on the proof. But assume for a minute that they did. It is wholly one case if duPont's conduct in lowering that price was directed toward exclusion or hampering of Sylvania. It is wholly another thing if duPont lowered that price to compete against other materials in the market, and Sylvania, to remain competitive, came along and in the overall market competitive situation was injured. It is a wholly different thing.

10635 So the whole thrust of our case when we have talked market power, market power, has been in the face of these facts competition in the market is such that we are obliged to act with regard for competitive influences and therefore do not have this absolute or monopolistic power that is to be inferred from the percentage according to the Government's theory.

Let us look at two little points from the Government to show we have been getting a great deal nearer to this as they have had to recognize the impress of these facts. They said in their very latest brief, the reply brief, on page 12, that the price of wax paper and glassine may put a limit upon the price duPont could charge. Well, we are getting pretty close—getting pretty close.

Then in their findings, Finding 46, they recognize that cellophane is in a series of different markets, they say in varying degrees, and they identified four or five different markets, and they say that cellophane is a factor in each of those markets. So they have come a long way. But I think what they fail to recognize is the true fact significance of the evidence that has come in.

10636 Now, let me see if I can present this market picture to your Honor, in terms of its bearing upon this price power. In the first place, if your Honor please, there are over fifty varieties of cellophane. We hear talk as though it were one commodity, one price. It is no such thing. There are over fifty varieties sold in sheet and roll form; plain, moistureproof, M. S. T., heat sealing kind, M. S. A. T., anchor heat sealing kind M. S. T., anchor type, colored, coated on one side, coated on both, different weights, different gauges, different degrees of moistureproofness; and the range of those prices, your Honor, as the evidence shows, is from 45 cents a pound to 85 cents a pound—45 to 85 cents a pound.

Then these other materials that it competes with are sold again in a great variety of kinds and at a great variety of prices. Glas-

sine, for example, the evidence shows that Rhinelander has thirty different types of glassine and that its prices range from 23 to 48 cents. Waxpaper at varying prices is sold in forty or fifty different types. Foil is sold in five different gauges, coated and uncoated, in a variety of price ranges. The same is true of cellulose acetate and pliofilm.

Now, your Honor, in addition, these materials are all sold in the market in combinations. Our finding 79, for example, will show you the great variety and complexity of those combinations,
10637 each of which in turn carries with it other price factors in the market and other prices.

Now, what I say to you, then, first, about this market is that there is no such thing as a cellophane price or waxpaper price or any other price, but there is a whole spectrum of prices, broad in range, overlapping, and that those prices, therefore, are closely intermeshed and narrowly related to one another.

Then if you turn to quality, your Honor—and quality is merely an element of price—you find that the greatest variety as between types and kinds of all of the basic properties that we have come to recognize in this case, the heat sealing, the printability, the transparency, the lack of transparency, the strength, the moistureproofness, the machine running quality, and so forth—as these properties vary by type, so do the prices vary by type, and if you take the composite of the value; that is to say, the properties of these materials, and the cost; that is to say, the price, the two things intermesh and there is in this market a whole conjury of varying qualities, varying values, varying prices, and from that group each buyer makes his selection. That the individual choices differ we certainly know well by now. One buyer uses at a particular time one type, another buyer at the same time may choose another or a different type or a different material. That they are functionally interchangeable is clear; that they are
10638 sold at the same time for the same use to the same classes of customers is clear. Actually, we have a whole series of cases where Kleenex, bacon, coconut, cookies, marshmallows and bread made by the same company are wrapped part in one material and part in another and sold to the customers at the same time—one package of Kleenex in cellophane and one in glassine, and so forth.

So that what you have in this market is a great variety of combinations of price, measured not only by the price list itself, but by the great range of qualities and combinations and permutations of quality; and every time duPont improved its quality it made a price reduction; and every time one of these other producers improved its quality it made a price reduction, because in so doing it offered more for the money; and the constant shifts of business

that have taken place because of price, and quality have demonstrated the close intercompetitive relationship of these materials.

I want to come to that in detail in a minute, to give you the evidence; but there are first ten factors in this market, your Honor, which all bear on the intensity of the price competition that exists. You are familiar with all of them, but their relationship and pertinence to price, price flexibility, price sensitivity in this market is what I want to point up.

In the first place, we are concerned with a consumable
10639 item. We are not selling steel bridges, furnaces, or roofs.

We are selling something that is used up, used up almost as soon as it is bought. It is sold mostly to wrap food, which itself must move rapidly; and the evidence shows there are very small inventories and that the man who has glassine has very little of it on hand and can rapidly shift to cellophane or waxpaper or what you will, and that the man who has cellophane can do just the same thing rapidly because he has no big inventory and he is in a fluid state.

Now, in the next point the facts show, your Honor, that we are selling to a group of extremely knowledgeable, strong buyers—the A & P, the large candy companies, the large meat packers. These companies have their own laboratories; they have their own testing facilities; they have their own hard-bitten purchasing agents. They are sensitive to quality differences, they are sensitive to price differences; they themselves are engaged in highly competitive businesses where margins of cost, margins of profit are important to them, and therefore you have a group of buyers which responds most sensitively to differences of price, to differences in quality; and, as I say, with little inventory they can quickly make a shift. They need no substantial capital investment to make this shift. They are in a position to run the same machines for different materials, and they with their own equipment in a bakery, if you will, can run through glassine, waxpaper, or cellophane.
10640 They don't have any investment they have to make, they just put another material in, make an adjustment in the machine, and go ahead.

Then, if your Honor please, we are selling in most cases where large volume business is involved to industries with low profit margins. The candy industry, the bread industry, the meat industry, the cereal people, for example. We had a lot of testimony both as to candy and as to bread. If the price of flour went up, the margin of cost might so change in the manufacture of bread as to dictate a shift from one expensive material to a less expensive material. In candy if the ingredients got more expensive, sugar or what you will, the same thing took place.

So you haven't only sensitive buyers with small inventories, not required to make any substantial capital investment to shift, but you have an economic compulsion upon those buyers themselves to watch closely every small, low margin of profit, and any deterioration of quality, any increase of price will reflect itself in their costs and result again in shifts of business and change.

The COURT: You mean that machine I saw in Atlantic City could substitute some other packaging material than cellophane?

Mr. GESELL. Yes, sir. And the evidence is explicit and replete that these packaging machines will take these different ma-
10641 terials, and we put on proof of the work we had done. The man was not cross-examined. We put on proof of the work we had done to work with the machinery people to make it possible to put through these old waxpaper machines and glassine machines these newer materials, and the machines themselves are functionally interchangeable.

Now, in addition—and I think your Honor will begin to appre-one—I don't say any of them are controlling, but I say the conciate how these things mount up when you take them one by posite of them is to present a picture of a highly sensitive market, sensitive to price and quality changes.

Now let us take this fact: The converters have four thousand salemen selling these flexible packaging materials. These converters handle from 35 to 40 per cent of duPont's business. We have no control over their prices, as is conceded. Not all of them, of course, even deal with duPont. Now, what is the picture? Here is a group of men with some four thousand salesmen calling on the trade; that is to say, the cereal manufacturers, the meat people, and others. They handle cellophane, glassine, waxpaper, pliofilm, acetate, foil, and this whole series of materials, and what do they do? They print them, they make bags out of them, they make wrappers, and they do other converting items. Now, they call then on the customer with a line of goods, your Honor. They have cellophane to offer, waxpaper to offer, or anything else; and if the customer says, "Cellophane looks kind of high to
10642 me, Jim. I think I better have this printed in wax"; or "I don't like the way one of these runs on my machine"; or "I don't get as good moistureproof protection"; or what you will, that man does not say, "Gee, if you don't want cellophane I don't know what to do; I will go back and talk to duPont." He says, "Sure, I have glassine, I have waxpaper, I have whatever you want"; and he sells on the basis of the best quality and the best price, and he offers the line of goods and he is not in any way subject to duPont's influence or control as to what he offers. So that again these people who are trained with their own technicians

in their understandings of the peculiarities of the materials are in a position to influence very substantially its sale or its lack of sale, and price and quality will determine that.

Next, if your Honor, please, we have heard a great deal about substitutes, but if there is any substitute in this case it is cellophane, not waxpaper, not glassine, not something else. It is cellophane, and from the day duPont started to make cellophane it was at the business of trying to break into an established market, for waxpaper and glassine were sold at lower prices, connected with the trade, having the big volume of business, and duPont has been in the position of breaking in against well connected, well established trades. So obviously it could not as to price or as to quality afford at any time to disregard the intense competi-
10643 tive position it had, and since it was then and is now more expensive than these dominant materials, it was never in a position to have an arbitrary price policy or to price as a monopolist would. Its price to penetrate this market had to be a competitive price measured in the light of the quality that it offered for its goods.

Then we go another step, your Honor. As to each of these you will realize there is a wealth of evidence and all I am doing is pointing up the significance of the detailed findings we have.

There is heavy competition in this business as to research. We know about duPont's research. We know the constant work it has done in that area. So have all the other manaufacturers of these other materials, and by research they have improved the quality, thereby lowered the price, and thereby gotten business. We got into the bread business only after we developed a heat-sealing film, just to give you one example, which could be sealed at the end of the loaf. We had a nice business in frozen food, and the waxpaper people came along with a better paper and took a great deal of it away from us. We had a nice business in fresh meats, and pliofilm developed a new type of film and took it away from us. There is case after case of that in the record, and that was done on a quality basis by the development of a type of material and reduction in cost, by an improved
10644 quality, and the business was taken.

Then we can just take another point, the financial strength of the competitors. Concerns in this business are shown to be not only independent of duPont and independent of each other, but to be financially strong and in a position to compete. And so I say to your Honor that looking at this picture as a whole—and you realize that Sylvania is in there and Olin is in there along with us—we have a highly sensitive market where every one of the indicia that you would seek to find out whether it was competitive and sensitive to price changes and quality changes are present;

and so the question is, Well, if that is true, your Honor would ask, and rightly so, wouldn't you expect to see shifts of business? Wouldn't you expect to see changes? And of course you would, and our finding 164 and our finding 163 itemized those changes based on price and quality as they appear in this record, and they run in the scores.

The COURT. What about the Government's point that prices settled into a pattern of stability, I think they put it?

Mr. GESELL. Cellophane prices in a pattern of stability, they say, from 1933 or 1934 on until 1946.

Well, your Honor, the answer to that is an explicit answer that it is not so. I have in the discussion of their finding on that
10645 the evidence to show precisely how much the price shifted in that period, what the degree of change was, and it was substantial; and that is simply another one of these simple statements that will not support analysis on the record.

In finding 164 and 163 as to both price and quality we have shown these shifts. We have shown in also, your Honor, by year and by type of customer. We have shown it, I think, in every conceivable possible way you could show it.

The COURT. For the purposes of my question, then, you challenge the accuracy of their statement that there was a pattern of stability?

Mr. GESELL. Oh, yes.

The COURT. You will come to that this afternoon?

Mr. GESELL. I can show it to you this afternoon explicitly on their findings. If you want just a brief indication of it you can turn to the chart at the end of our brief which compares the prices, and I think perhaps I would take that up now, although I had it a little later in the argument. It makes no difference.

Let us turn to that chart at the back of the brief. This is a chart which is designed to show the relationship between duPont's production and the relative prices of cellophane and glassine and waxpaper, taking types of each by way of example. If your Honor will look at the heavy line, the heavy black line that runs across, that is the line that shows duPont's production as a
10646 percentage of the total production of flexible packaging materials, and the scale for that, your Honor, is on the left; so that you see starting in 1925 or 1926 we had far less than one per cent, and you see how that line has traveled across the page up until, as you see at the top, on the left, it is 18 per cent of the flexible packaging production.

10647 The other two lines are measured by the scale on the right of the chart. The first one, the non-broken line, the thinner line, shows the number of times duPont cellophane was greater than the price of glassine. So that you start there and go to

the right and you will see that in 1929, where our figures start, duPont cellophane was approximately seven times the price of glassine. Do you follow how the chart works?

The COURT. No.

Mr. GESELL. Well, go to 1929 at the bottom, and you will go up then to the line, the thin line, marked, number of times duPont cellophane was greater than the price of glassine. Do you see that, the specific type of cellophane there indicated? Then if you go across horizontally to the right, you come to the number 7, horizontally to the right on the chart. So at that time it was seven times—300 MT was seven times the price of glassine in 1929. Do you follow that?

The COURT. Yes.

Mr. GESELL. And if you trace it on down until you come over here to 1949 at the bottom, you will see that now it is two times the price of glassine.

Following the same on the broken line, which is the comparison of 300 MT with the specific type of wax paper there shown, you will see that from 1934 at about four and a half or five times, it also has come down to two times.

So that what has happened is that the relative price,
10648 Your Honor—and these are just examples—of cellophane and wax paper and glassine has diminished. Your Honor follows that?

The COURT. Yes.

Mr. GESELL. Now, the question is, what has happened to production in relation to the narrowing of that price gap against these dominant competitors, with lower priced materials, and you go back to that line that I mentioned a moment ago and you will see an extraordinary degree of relationship between the increases in our production and the narrowing of this price gap against these lower dominant materials. The sharpest rises in the production curve take place—percentage-wise, you understand now; the percentage of our market has gone up sharply as the relative prices have sharply decreased and our production has been an increasing percentage of the flexible packaging markets as the relative price between cellophane and these materials has diminished. And there is a correlation in the sharpness of the curve with the sharpness of the narrowing of the gap.

Take '39, for example, and go up to the point, you will see that there our percentage of production of the flexible packaging material started up rather sharply, at the same time there was an appreciable narrowing of the gap percentage-wise. Now, Your Honor, that shows—and it is all based, as the previous page shows, on exhibits in evidence—it shows an extraordinary degree of sen-

sitivity of this business, of duPont's ability to produce and
10649 its percentage of the business, to the relationship between its prices and the prices of the other materials. And it negates any notion that we had some arbitrary power, for I don't think anyone could read this chart and expect to see this percentage of production going up the way it does if the other two lines went directly horizontal across the page. The relationship is too clear, it is too obvious, it is too explicit. There is much more evidence on it in the record that I am coming to, but that in pattern is what it shows.

Now, you asked about stability, and if you will look from 1935 on, you will see that in 1935 our relative price in relation to glassine was four times as great and our price as to wax paper was four and a half times, almost, as great. And in this so-called stable period that Mr. Minicus is talking about, we have dropped to where we are only two times as great. So it was not price stability measured in terms of relative price, which is what this shows, and I am going to come in the discussion of the findings to the explicit findings as to our price as a price alone, and it will show the same thing.

So that all I say is that the end result of all of this evidence is depicted in terms of its legal significance on this chart, that as the relative price between cellophane and the lower priced materials came closer and closer together, and the gap was narrowed, only then did duPont succeed in producing and selling a greater per-
centage of the market. And no clearer evidence could be
10650 available of the absence of any arbitrary unbridled power over price.

Now, I say to Your Honor this, I have this chart at the end of my discussion because I am quite prepared to say that you can't prove anything by a chart standing alone, but as I go through this evidence this morning about the price competition in this business, I ask Your Honor to keep that chart in mind, and you will see time and time again that in the evidence there is explicit proof of the lessons that I say this chart teaches in terms of our overall power.

Now, I have discussed the conditions in the market which made it sensitive to price and I had just come to the point of saying to Your Honor that you would expect that to be reflected in shifts of business, and in our Findings 163 and 164 you will see those shifts listed. They have been taking place steadily over the years as to every product, as to large and small customers, as to different kinds of materials, and if you trace down those record references, you will see scores of examples where business was lost or business gained due to price or quality, the two, of course, for the reasons I have indicated, coalescing into the value of the product offered.

The Court. Well, what was the history of these other packaging materials? Did they lower their price to get away from cellophane's price or did you lower your price to approach their price?

Mr. Gesell. We lowered our price to approach [illegible] them. They have always been lower. They have always been dominant. And we have been coming down, and the price pattern of the newer materials is the same way—Pliofilm, it came in high early, high cost getting started, and down she goes, to come into this area of competition.

The Court. Let's take a five-minute recess.

Mr. Minicus. If Your Honor please, for my information, I haven't wanted to interrupt during the course of Mr. Gesell's argument, but I would like to know what the status of this chart is. We have never had a chance to cross-examine on it, and I find some very serious questions about the matter.

The Court. Well, it is not in evidence. Its function is to be illustrative for the purposes of assisting Mr. Gesell in his argument.

Mr. Minicus. As part of their brief, of course, it will go into the record.

The Court. No; under Black & Yates v. Mahogony Association, Third Circuit Court of Appeals, briefs are not part of the record.

Mr. Minicus. Under those circumstances, I will withdraw my objection.

Mr. Gesell. Your Honor appreciates the sources that are shown on it.

The Court. You can take that up with me this afternoon, 10552 if you want. You said you were going to wind up by relying on that.

Mr. Gesell. We are coming back to it.

(At this point a brief recess was taken.)

Mr. Gesell. While we are on this price stability point, Your Honor, may I bring to your attention the other material, which I had on this at a later point of my argument, so that we can get rid of it now.

If you will turn to Finding 72b of the Government, you will find that that is their finding on price stability. You will see that it says, rigid and stable prices from December, 1935 through 1947, and they say we have undergone only four price changes. Then the next sentence is that during—not from December, '35, but during the period '35 through '46 there were only two price reductions. Well now, the first thing I want to point out, Your Honor—and this is rather typical of many other findings—is a very neat little dodge in the language, by saying from December

in one place, in the other saying, during the period, they neatly eliminate two price changes that took place. There was a price change 1-7-35, January 7, '35, and there was another price change 12-16-35, both of them shown by their own exhibit, GX-549, that is cited there, but by talking first of all from December '35 and then talking, during the period, in order to help their statistical approach, they just eliminate two important price changes. But we will go on.

If you take a look at what they have done, you will
10653 see down lower on the page that prior to '35 duPont cellophane underwent 17 price reductions. Well then, there was in fact a price reduction in '35 which they omit. Then they skip and they refer to a 19th reduction, DX-363, and to a 20th, DX-364. Now, we have put the whole thing together, and you will find that here is what happened. The price of PT, January 1, '35, was 38 cents a pound, 300 PT. January 1, '36, it was 35 cents a pound. That is eight per cent below 1935. By 12-7-41, it was 33 cents a pound, or six per cent below 1936 and 13 per cent below 1935. And if you go over and take a look at the moistureproof prices, 300 MT, it started out at 52 cents a pound: January 1, 1936, was at 46 cents a pound, or a drop of 12 percent below '35; and at 12-7-41, it was 41 cents a pound, or 11 per cent below 1936 and 21 per cent below 1935. Then during the period of the war, that was from '41 through '46, there were no price changes; we were in the OPS. Then after the war prices went up.

10654 Now, this stability that they talk about shows in the period from 1935 to 1941 a reduction of 13 per cent on P. T. and 21 per cent on M. T.; and to make it even clearer, your Honor, they introduced evidence—this is in the form of documents written by Mr. Hatt in which he said we really have a difficult time here keeping the prices where we are, because costs are rising and the whole economic situation was a difficult one for price reduction, and yet even so this so-called stability showed the specific reductions per pound of both types, and by a cute ellision of words they try to take your Honor's attention away from two or three of the most significant price changes.

So much for the stability point.

I hope, your Honor, as time permits to make comparable analyses of quite a number of other findings in that book.

As I shall show, we have in the evidence very substantial proof of price changes of all types between all materials and over a long period of years. I ran off a few of the names of the customers who shifted from cellophane to glassine on the basis of price or from cellophane to waxpaper or to acetate or something else, and it is a list of principal accounts, important customers—A & P, Ward Baking, Smith Brothers, Snow Crop, Kellogg, General Mills,

Curtiss Candy, and so forth, many, many of them in that evidence.

Now, the Government has had a complete blind spot
10655 on this part of the case. They have failed to recognize the evidence which is explicit on this price competition and on the limits that it placed upon our power, and I think the best way that I can get it over to your Honor is just to dip into this evidence a little and see what it shows on this point, and as I read some of this evidence I hope your Honor will have in mind the chart at the end of our brief and have in mind that we are discussing whether duPont was in a position to raise or lower its prices as it chose without substantial regard for competitive influences in the market. I think you will see from this evidence that we were reducing prices to get greater volume in order to again reduce cost and get in a position where our product would enable us to get business that was held by these lower priced materials.

We start way back in 1924, your Honor, with DX-337. Here is a statement by Mr. Yerkes in 1924. He says, "Our price I think is too high based purely on manufacturing cost, and too high in comparison with other wrapping papers on the market, and while we cannot approach the price of glassine or other oil papers, if we make a substantial reduction we will in some cases get somewhere near them."

And it was that that Mr. Carpenter was testifying about when he said at page 6276 of the transcript:

"We felt that with a very much lower cost product that
10656 there would be an opportunity for a large market in this country as a wrapping material, and as we continued with our efforts in that direction, we were successful in reducing the costs, and as we continued in our efforts to introduce that into the wrapping industry we found success in expanding the markets."

Then I put it to Mr. Yerkes at page 6942 of the transcript in explicit terms. I said:

"Question: Let me ask it this way: In setting your prices did you take competition into account and if so what competition?

"Answer: I thought I explained that or maybe I just bordered on it. We always took competition and competitive prices into consideration, the price of glassine and waxpaper, which were our competitors, whose business we were always trying to get and obviously when we made a price reduction we had something in view that we thought would meet that particular situation.

"Question: To what extent in the discussions in the board and elsewhere did you discuss these competitive considerations as underlying your price program or your price reductions?

"Answer: I think they were discussed very frequently as to how much reduction would have to be made to get into this business or

that business, or how much glassine business we could get if we reduced the price X per cent. That was always in our mind. It was more or less of a guess obviously.

10657 "Take the bread business, for example. We nibbled at the bread business. We would get a little and then lose it and then we would get a little more. Every time we reduced the price we could see plainly where we got more business.

"Question: Did you take into account when you were setting your prices the possibility that somebody else might enter the cellophane business or that cellophane was being imported into the United States?

"Answer: We would not have been human if we had not thought about possible competition, and I certainly would not deny that we did at times think about other people coming in.

"But our main theory and our main object all through the years was based on our competitive situation versus the other wrappers, those fields were the field we could get into. They were the only objectives we had. There weren't any big new things that nobody was in that we could go out and sell cellophane to. We had to go into the wrapping field that was already occupied."

Now let us look at the documents as they go through on this price thing. GX-347 at page 869, a document from Mr. Hatt:

"The reasons for consideration of proposed price revision at this time"—this is 1929, now—"are largely the attempt to open up new and large markets on possible units of lower priced com-
10658 modities and also, the present and prospective competitive situation, not only as regards other manufacturers of a material similar to cellophane, but also including the recent improvements in glassine."

Take another one, DX-312 in 1931:

"The outstanding competitive development is the introduction by the Riegel Paper Company of a new product—'Riegelite', a glassine of greater transparency and moistureproofness than any yet developed, and selling for 17¢ per pound. So far, this material has been competitive mainly in the baking industry where it has replaced cellophane on low-priced low-profit items produced by several of the largest baking organizations. Due to its price and general characteristics, as well as the price-cutting situation on the part of members of the baking industry, this new product may be a very active competitor."

Now, is it possible that in 1931 intelligent businessmen having been told that here was a new product of improved transparency and moistureproofness selling at 17 cents a pound and cutting into their business, is it possible that a group of businessmen would have said let us raise the price of cellophane, that that is obviously

the thing to do? They would never have thought about it; it would never have occurred to them. The competition was there; they did not have the power to do it; they were already losing business to the lower priced commodity; they were experi-
10659 encing price competition and they were lowering the price and they continued to lower it.

The COURT. What was the date of the introduction of that Riegelite?

Mr. GESELL. That was in 1931, DX-312, your Honor, 1931.

Now, we have a competitive report in 1932, "Competition From Other Transparent And Semi-Transparent Sheetings." The report is concerned with and it refers to development in the baking industry where the bakers are in the middle of a price war as between each other and their margins of profit are declining, and they say that this has served as an impetus to manufacturers of semi-transparent papers who are successfully capitalizing on their low-priced wrapping materials. It says, "Facing these conditions, the industry became cost conscious to the nth degree which prompted the individual bakers to ignore the advantage gained by the use of cellophane and to give consideration to cheaper wrapping materials in the form of semi-transparent, waxed, glassine wrapping paper.

"A number of them discontinued cellophane entirely, and others gave us cellophane on low priced items in favor of such papers as Riegelite and Aquatome."

Now, your Honor, isn't that price competition? Isn't it also proof that duPont was not in a position to exercise an arbitrary power as to its price? How with these low-priced materials
10660 cutting in and taking business away in competition with them were they in a position to say, well, we ought to do this or that or the other to get an exorbitant profit or some other monopolistic move? They were caught from the beginning in the middle of an intensive competitive situation and their conduct as to price both as to motive, purpose, and specific regard was related to competitive conditions day to day in the market place. When Mr. Carpenter and Mr. Yerkes talk about the objective of bringing this price down to compete to get some of this business, they were talking about realities and not about theories.

Here is another document, DX-327 in 1939. I have chosen ones, your Honor, more or less across the whole chronology of this case. This is a document that defendant introduced. It says, "As prices of wax, glassine and chipboard have been going up and 'cellophane' down it is important that we obtain as quickly as possible an up to the minute picture on a square inch basis.

"It would be well to get, if possible, a history of price increases of the competitive materials this year which can be contrasted with

our price reduction—then translate competitive prices to a square inch basis.

"Naturally, this is going to be a little difficult from the standpoint of selecting the proper types of glassine, wax and board, owing to the fact that there is such a wide range. On the
10661 other hand, it should be possible to find out what are the three types of wax, two types of glassine, three weights of board, or whatever, most generally used in the baking industry and also in the candy industry.

"After we collect this information we should be able to translate it into comparative costs on a 16 ounce loaf of bread, a two ounce candy bar, etc."

The COURT. I don't understand what they mean when they say on a square inch basis.

Mr. GESELL. This material, your Honor, is sold on a pound basis, but since it is different in weight and gauge and is sold as a wrapping material the price is translated to area, so that the buyer knows how much he can cover per pound or per penny; and therefore—this is a memorandum by Mr. Brown, sales manager, saying look here—this is in this period of stability, you will notice—our prices have been coming down and they have been going up, he said. Let us get this into the practical business terms that our customers will understand. Let us take our price, find out what the area of a typical candy bar is, what the area of a particular loaf of bread is, and what it would cost in cellophane to cover that and what it cost with these principal types of glassine and Riegelite, and then let us go to town on the trade and show them what we have been doing. Isn't that price competition? Isn't it the most explicit kind of evidence of the interplay of these materials in the market in terms of competition as to
10662 price? And, of course, in passing it throws further light on this stability argument, because we are talking within our own company, our price is coming down; let us take advantage of it.

Now, let us take another one in 1941, your Honor. I have been skipping along by years. Here is a letter by Mr. Hatt in 1941, Government Exhibit 5542. He says:

"It has been our policy also to reduce our prices to the public generally on 'cellophane' film as rapidly as our cost of manufacture and increased volume would permit, and this in turn has made it possible for many more concerns to use our materials in both plain and converted forms at these lower prices than would have been the case had we maintained higher costs and selling prices with the consequent lower volume that would have resulted."

Then there is another one in 1943, a report, lots of it is pertinent, GX-5544. I shall just read one or two sentences from it:

"Cellophane still needs promotional selling, if only for the reason it costs twice as much as its major competitor, paper."

Then we are back in 1947 in DX-371, to a little comment:

"Riegel Paper Company"—this is under the heading "Waxed glassine"—"is putting on a concerted drive on printed
10663 glassine—attempting to capitalize on the high cost of printed cellophane."

And so it goes.

The witnesses, your Honor, the witnesses have no different view about this thing, and I would like to just show you what the sweep of that evidence is, and we can look at it from the point of view of different categories of witnesses who took the stand and who were not duPont people, but who were businessmen engaged in this price competitive market.

Here is what Curtiss Candy Company said, a user witness, now, Curtiss Candy Company. It says in DX-1006: A cellophane price increase would have had a serious effect on Curtiss' purchases, and Curtiss would either reduce the size of the product or shift to a less expensive wrapping. Cost is always a factor in Curtiss' choice of wrapping materials.

General Food Corporation says the price of a flexible packaging material is a very important factor in the selection of a material, and cellophane is only 15 to 20 per cent of the total flexible packaging material used by General Foods. Cellophane price reductions have enabled General Foods to increase the use of cellophane Waxpaper is used rather than cellophane on food products because of cost. For any product there are normally a number of these materials available, and the decision is based on cost, performance, etc.

10664 National Biscuit in DX-1016 had the same evidence to offer. It says Price relationship between packaging materials and price reductions on cellophane have had considerable effect on the purchases of cellophane. The lower price of paper to cellophane had a competitive disadvantage on National Biscuit Company's products.

Armour had the same evidence to offer, and then we go to the producers, your Honor, away from the users. We go to the producers of these materials and we run again into the same thing.

The Celanese Company, making acetate, they say they always aimed at cellophane in marketing and pricing their film and that they are currently trying—this is in DX-1007—to reduce and spread the price between cellophane and cellulose acetate which was reduced when cellophane prices went up and that of cellulose acetate down.

Goodyear Tire and Rubber, which makes pliofilm, says in DX-1044, "The price spread between pliofilm and other flexible

packaging materials is considered in planning pliofilm's sales program aind efforts. A reduction in the price spread between cellophane and pliofilm prices or the widening of the spread over a long period of time would definitely affect pliofilm sales.

Rhinelander in DX-1020—they are the glassine and wax-paper people—they talk about price and they say that
10665 Rhinelander in selling makes a point of the relative costs of glassine and cellophaine, and duPont's price reductions tended to hold the glassine price down; that a sharp reduction in the moistureproof price would cause Rhineland to lose business, whereas a sharp increase in the cellophane price would cause increased sales of moistureproof glassine.

Riegel had the same to say. Mr. Leinbach was on the stand, you will recall. Then we had converters, Printon Company and the National Gum and Coated Paper Company and Shellmar and Milprint, and they all said the same thing, and the salesmen reporting from the field said the same thing.

This evidence is replete with proof of intensive price competition of which I have given you under the exigencies of the time and the problems of oral argument simply a few samples.
10666 I want to return, in the light of that evidence, to the contentions of the Government and to the discussion of the applicable decisions.

In the first place, Your Honor, we have the Cracking case in 283 U. S., which related to this question of price power or price control, and there the Supreme Court pointed out that since the principal companies involved were making cracked gasoline, which accounted for only 26 per cent of the gasoline production, and that this gasoline was sold interchangeably with straight run or ordinary gasoline, which accounted for 74 per cent, that there could be no claim that there was a control of gasoline production. Here were two different kinds of gasoline being sold interchangeably, and the Court said, under these circumstances the primary defendants—they were the cracked gasoline people—could not effectively control the supply or fix the price of cracked gasoline by virtue of their alleged monopoly of the cracking process unless they could also control, the Court went on to say, the remainder of the total gasoline production. In other words, how could you say that one type of gasoline gave these people the power to control or fix the price of all gasoline when it was but 26 per cent of the total interchangeably sold gasoline, other types accounting for 74 per cent?

Then we have the Columbia Steel case, Your Honor, and that of course is specifically pertinent to this. When the Court time and time again in Columbia Steel, both in the District

10667 Court and in the Supreme Court, talked about the relevant market to be considered, the competitive area and product for consideration, the proper market for measuring competition, the relevant competitive market, and so forth, it was talking about the need of looking at the interplay of the competition between the various products found in that case for the purpose of determining whether there was any unreasonably or illegal condition present. And of course in that case the Government itself had to recognize that products performing the same functions but differing somewhat in their characteristics may be just as competitive as products which are identical.

Then we have the Corn Products case, Your Honor, and the Corn Products case is directly in point on this. There Judge Hand considered the question of power over price, and he found that there were products indistinguishable in use where there was a cost differential, and he recognized that of course you could have a monopoly of the cheapest of those products, but he said that if there were other products that were cheaper and sustained competition existed, then you would have to disregard that portion in competition. It fits the cellophane situation quite nicely. There are other products in competition, sustained competition, at lower cost and therefore in measuring position, influence, power, dominance, or what you will, that must be taken into account.

We have had here interposed, Your Honor, against the 10668 facts as I have outlined them and the cases a theory, and I want to deal with that theory briefly for a moment to show you how unrealistic it is and again to demonstrate the wide gap that exists on this phase of the case, as in others, between the Government's views and the evidence.

The Government says, you cannot take into account any of this competition because there is a consumer preference, and that if you can draw a line at a particular point of time, there are certain people who have bought cellophane and certain people who have bought other things, and that therefore at that particular moment those people preferred cellophane, and they constitute a distinct and separate market, and at that particular point of time there was power in duPont over price because you can ignore all the competition.

Now, that certainly cannot be a realistic view of how business is conducted or of what the cases hold. Did duPont view it that way? Of course not. Is your knowledge of how business is conducted viewed in that way? Of course not. Let's say that customer was National Biscuit and he was buying day in and day out in the market and was shifting back and forth from cellophane to glassine to wax paper, he was just as much as customer of

duPont whether he bought cellophane or bought wax paper or glassine. He was a man who could be sold and ought to be sold and was shifting back and forth. And since he changed,
10669 since he was not a static market, since his preference, so to speak, was not a preference that had any lasting quality, he cannot be isolated out that way, and he cannot be made quite so individual, because while one biscuit manufacturer may have preferred cellophane and the other preferred wax paper and the other glassine, at a particular moment in point of time, those three people all shifted around; there is no class or group of customers shown to have this preference; and this is not a sale of something that stays put and stays sold—I mentioned a furnace or a roof or a bridge—it is moving, it is volatile, it is changing all the time, and the notion that Your Honor can carve out a theoretical market and ignore what these samples show and what the witnesses said is to say that anyone has monopoly power.

There is a consumer preference, Your Honor, for Ford cars, and at a particular given moment there is a Ford car market consisting of the people who have brought only Ford cars. Is that a monopoly then? Or all the people on a particular day who eat shredded Raltson, are they a market? Or strawberry ice cream, are they a market, though the next day they may take vanilla?

The COURT. I will never forget that.

Mr. GESELL. I don't want Your Honor to forget it, because it is at the heart of their theory. This is the strawberry ice cream theory, reduced to finer words, but it comes down to just the same thing: whoever at any given moment of time thinks
10670 he wants a particular product is part of a distinct and separate market. Now, that cannot be true in the realities of the marketplace as it functions, and we have shown that these people shift and change and are volatile and are not tied to duPont, are not tied to cellophane, and therefore, he has to take a wider base. And they attempt to find legal support for this position, Your Honor, by citing to you a whole group of cases concerned with what is the part of trade and commerce, the Farmer's Guide, the Peto case, the Story Parchment case, and the Lehigh case, and all that line of decisions that are covered for pages in their brief. None of those cases, Your Honor, are monopoly power cases. They are concerned with the geographic part, as in Farmer's Guide, or the term of a market, like the Corn Products case, or with price-fixing, or with tie-in clauses, or with commercial boycott, as in Fashion Originators, or various kinds of collusive agreements not to compete, Section 1 cases. They are not cases concerned with monopoly power, and none of those cases says that in determining monopoly power as to a product the

court shall ignore the competition in the marketplace afforded by other products. They have to do with whether you can restrain trade or monopolize as to an area or a particular product, but they don't have any concern with the question of monopoly power. And in most cases Your Honor will note they relate specifically to per se violations, where the defense was interposed on the grounds of reasonableness, that a tie-in clause was reasonable be-
10671 cause there were other competing products not tied in; that a slate green roof price conspiracy under Section 1 was reasonable because there were other pieces of roofing material sold; that a fashion boycott in violation of the unfair trade practices laws of the FTC was reasonable because there were other dresses sold in the Fashion Originators Guild; that an agreement not to compete was reasonable in the Timken case because of competition from other materials—all per se violations, not Section 2 cases where the defense was interposed, we ought to get out of this violation because it was reasonable to make a per se offense in a limited area, or geographically, that we didn't monopolize all of the United States; we only monopolized the Northwestern Section of the country and therefore we ought to be allowed out. And of course, the courts have said, that the Act has a distributive and a geographical significance, but these cases—and you can read them backward and forward—do not concern the question which I think Your Honor determined is the law of this case when you permitted in the evidence on monopoly power as to the competition between these materials. And you are not here confronted with any new law question, any different law question; it is a simple fact question, do we as to cellophane have this price power, after you look at all of the relevant market considerations, and after looking at all of them, if you find that our price is controlled within reasonable limits by competitive influences and that we can't raise and lower at will in
10672 the manner of monopolists, then you must find as to cellophane we don't have the power, and it is a straight fact question. And this market proof goes to the heart of it.

If we could recess now, I would like to take up briefly after lunch, Your Honor, the Aluminum case for a moment and then turn to the findings.

The Court. All right, we will recess until 1:30.

(At this point a recess was taken until 1:30 p. m., the same day.)

10673 1:30 O'Clock P. M., the Same Day.

Present: As before noted.

Mr. Gesell. Your Honor, at the recess I had just completed the discussion on both aspects of power, power to exclude and power over the price. Before turning to the Anti-Trust Division's pro-

posed findings, I want for a minute or two to discuss the Aluminum case, not by way of any exhaustive analysis of it, but it is, after all, the decision on which the Government primarily relies, and I think it is clearly distinguishable from our case for quite a number of reasons, and it occurred to me that it might be useful to put it all together in one place so that you could have our contentions in mind.

The first distinction between our case and the Aluminum case is a very important distinction. In the Aluminum case, Your Honor, there was no patent involved. As the opinion said, the last patent monopoly expired in 1909, and in fact the *the* evidence shows the basic patent had expired before the Aluminum Company even started its production.

In the second place, the court found that the Aluminum Company had between 1909, which was the date when its patent expired, and 1912, perpetuated its monopoly position by unlawful practices which had been the subject of other Anti-Trust litigation. So at the outset you had a company operating not as duPont was under a patent, but a company which had been adjudged
10674 guilty of Anti-Trust violations at the incipience of its non-patented period from 1909 to 1912.

In the third place, the Aluminum Company was the sole producer. Here there are three producers, even if you look at the case within the narrow ambit that the Anti-Trust Division urges on you. There in the Aluminum case there was but one, with over 90 percent of the production, and the distinction between the conduct of a company which is the only producer which controlled more than 90 per cent of the business, which has no patents, and which started and from the outset was adjudged to have been illegal, from our situation is readily apparent.

Now, next the court found that there were no substitutes present, Your Honor, there were no substitutes present unless Alcoa raised the price; so that whatever price this sole producer set was the sole price, was the only price, and substitutes were not present unless Alcoa raised the price to bring them into play. Here we have not theoretical substitutes that may be brought into play by a price change in the control of the producer, but we have actual competing materials which were not substitutes but actual competing materials operating in the market.

Fifth, on the power to exclude competitors, not only was the company found to have been unlawful at its inception, but it was found to have expanded without determined effort to keep illegally gained control—to have expanded with a deter-
10675 mined effort to keep illegally gained control. And Judge Hand found that there had been one or two abortive at-

tempts to enter the industry which were effectively anticipated and forestalled—actual efforts to go in which his company forestalled.

Finally, the court found that in Alcoa's case the capacity available was used and geared in such a way as to always be present and available before any new use or opportunity to sell was generated by their sales activities; whereas, as our evidence shows, we were constantly during almost the entire period in an oversold position and trying to get our capacity to catch up with the uses.

So that on the power to exclude competitors we have four distinguishing facts, no determined effort here to keep illegally gained control, no illegally gained control, no actual abortive attempts to enter and then forestalled, and no use of capacity in the manner of Alcoa.

Then as to power over price—as to price, this company, Alcoa, was free to raise price as it chose, up to the level that would induce import. There were no competitive limitations upon its power to do so, the court found. We have, of course, such limitations here. But on top of that, the court found an actual exercise of price power in the price squeeze by which Aluminum kept the price of sheets so low and the price of ingot so high that the fabricators were unable to buy goods from Aluminum and compete
10676 with it except at Aluminum's suggestion or permission.

In our case we have patent protection, valid dominant patent; in their case none. In this case we have 68 per cent, or 20 per cent, whichever way you look at it, as against 90 per cent. We have the so-called substitutes or competing materials present without raising price; we have no expansion with a determined effort to keep illegally gained control; we have no evidence of actual abortive effort to enter this business; and we have nothing comparable to the price squeeze or other exercise of monopolistic price power.

This case that you have before you, Your Honor, falls within the exceptions recognized in the Aluminum case and in a whole line of decisions which I am not going to review but which are covered in my brief in pages before and after 85, where the court recognizes that superior skill, foresight and industry are not to be penalized under the Statute and that the successful competitor having been urged to compete must not be turned upon when he wins. The case is distinguishable on its facts in every important aspect that we have had under discussion here.

Now, if I may, I would like to turn and take up the proposed findings, and for the rest of the afternoon I would like to present to Your Honor an analysis of these proposed findings which have been submitted to you by the Anti-Trust Division.

10677 Perhaps by way of preface it would be well for us to indicate what our point of view is about them and the approach that we take to these fact issues. In the first place, we disagree very much with the Government's notion that if in a phrase of a document you find a scintilla of evidence, that that in itself constitutes the weight of the evidence as a whole, and that whether that piece of evidence is in 1929 or 1947 it is applicable to the entire period. The Court of course must apply its experience as to how business is conducted and how reasonable men act against the weight of this evidence as a whole. And this is particularly important in a case which, like the Government's, is so substantially built upon inference, upon highly selected use of documents. And it is particularly so because the Government has the burden here and it is a heavy burden. But it is so for another reason that I want to emphasize to the Court.

There is no review, Your Honor, from the findings you make. There is no court of appeals to whom we can go under this procedure. If this case is ever appealed, it goes only to the Supreme Court. No attorney experienced in Anti-Trust litigation on the Government's side or on the defendant's side has any question but that facts cannot be reviewed on appeal to that body of men, and so the responsibility that rests on the Court here, as a finder of fact is a very and specially heavy one, particularly in a case of the magnitude and complexity that this simple case has been made by the Government's approach. And that is the reason that

10678 I have felt that rather than follow the usual practice of attorneys in cases of this kind of saying, "Your Honor, you must read those findings and I assure you they are not supported by the record," thus leaving the whole job to the Court, that possibly by taking a substantial portion of the argument time and dealing with examples from these findings by way of example, I could point up to you some of the difficulties that are present and alert you to some of the techniques and approaches which the Government has made to the evidence.

I don't know whether your Honor has ever been in Florida and looked across at some of that extraordinary land in the Everglades where everything seems firm and stable, but people walk in it and find quagmires and pot-holes and very few firm pieces of ground on which to tread. What I really want to do here is to point out to you as clearly as I can what the pot-holes and quagmires are in this rather amazing document which is entitled, "Proposed Findings of Fact."

In the first place, Your Honor, I would like to turn to the beginning of these findings and go through them, not one by one—there are 454 in all and 180 pages of close type, and I could not

possible comment on each and every finding—but I am going to try to show you, if I can, various examples to illustrate the nature of these defects and to point out our view about them.

The first finding I would like to mention is Finding No. 2. This is one of the so-called asterisk group. Generally,
10679 Your Honor, with very few exceptions, those findings are not supported at all. They frequently carry substantial record references after them. Your Honor called my attention to one earlier in the argument this morning. But almost without exceptions those references are to Mr. Minicus' argument; they are not references to evidence. And the reason that they seem to be so numerous is that, with commendable diligence, the Anti-Trust Division has excerpted any moment when I happened to be talking about the same issues, and so by dropping out what I said and citing only what they said, it looks as though there are a large number of important citations after the finding, and all they are is Mr. Minicus talking. And I have felt throughout the trial that he was not testifying and I have had no more opportunity to cross-examine him than he has the chart that I mentioned this morning.

So I warn you in the first place that the first quagmire you must look for is that these highly argumentative asterisk findings do not have behind them the support of any probative evidence. But there is another device in them which I think is particularly objectionable and inappropriate. You will notice that the footnote says that the findings will be supported in detail by the specific findings immediately following; and in each case there is this general finding and then a series of specific findings and then another general finding with an asterisk. But in many,
10680 many cases none of the specific findings that follow supports the general statements in the first finding.

10681 Now, this first one which I have chosen to begin with is an example. There is nothing in the ones that follow that support the statement concerning a large number of buyers, their requirements, or the sources from which they seek to satisfy their packaging requirements. All that is spelled out in the text of Finding 2, but you may read the other findings that immediately follow and you will not find them reflected in anything that has any substance behind it. That device, which I would say here isn't particularly objectionable, gets increasingly objectionable as you go through the findings one after another and find more and more and more that the Anti-Trust Division is putting into its asterisk findings facts that they can't support in detail in the hope that a casual reader going through it will get the impression that there is certainly a lot here that is important and disturbing. So that is my first observation with respect to this matter.

Now, next I will turn to Finding 3, if I may. The next is another device, quagmire, pothole, or whatever you want to call it. Your Honor will notice in the first place that the practice has not been followed in these findings of relating the record references to the subject matter. There is a long finding presented. Frequently these findings contain many different facts, and with very rare exceptions the record references on which reliance is placed is found in a lumped group of citations at the end.

10682 Now, this is such a case, and there are many, many more.

I will call your Honor's attention to the fact that duPont did not follow that practice, and you will see in our proposed findings that sentence after sentence is footnoted by specific references at the bottom.

Now, if you follow this finding and read the record references you will find that there is nothing, for example, in the record references under Finding No. 3 to support the statement that duPont had the power to direct the management and policies of duPont Cellophane Company. They ask you to find that it had the power, but there is no record reference that supports that fact which is one fact thrown into a bunch of facts that look purely formal, and there is no record reference supporting it.

I want to refer to the fact—and I will point out its significance later—that the finding notations of the Government throughout are undated, and your Honor will notice that again that practice has not been followed by duPont. The undated record references, therefore, are particularly disturbing and alarming when you notice—and I will point out example after example to you—that a statement is made as of a condition, let us say, in 1940, supported by a record reference which is dated 1929; or a statement is made as to a condition having prevailed generally through a period of twenty years, supported by a record reference dated 1931.

10683 And so I would urge upon your Honor in studying these findings to watch closely not only the fact that the record references bear no full support for all of the statements in the finding, but that in addition there is a pothole or quagmire there that has to be watched, that of dates.

Finding No. 7, your Honor, is another one of these asterisk findings. The transcript reference there—and this is another problem—the first transcript reference of some 90 pages is Mr. Renninger's argument. Then there is a transcript reference to the testimony of Mr. Smith, and what has happened there—and this again I use by way of illustration—is that time and again the transcript has been very seriously abused by the selection of a bit of testimony at a particular point in an examination which was fuller and more complete. For example, here at transcript page 5940 which is cited under this Finding No. 7 Mr. Smith says

that cellophane is a different product from waxpaper or glassine, and you see it cited there as being a separate and unique commodity. At transcript 5941, the next page, Smith says that cellophane is no more unique than any other product, and at transcript 5581 Smith says "I know nothing about cellophane that is unique." So if the pleader had been anxious to present the testimony to your Honor, the meaning of the citation at 5940 is totally different when the composite of the testimony is examined.

But there is a much more serious issue here, your
10681 Honor, and I refer there to the citations to the depositions.

Do you see them under No. 7? They are throughout here. Deposition page 53. Now, your Honor, all of those citations—and this is extremely important—are not made to the summaries. Those are not citations to the summary, and I see your Honor picking the summaries up. Those are not citations to the summaries. Those are citations to pages of the testimony of these deponents, specific pages of the transcript.

Now, we had a very clear and definite understanding with the Court about this problem, and I want to show you how the violation of that understanding has led to very serious difficulties with these findings. It was that the summaries were accurate; it was that the Court would rely on the summaries and that in accordance with the procedure established, unless some error could be pointed out to the Court, the summaries would control; and Mr. Minicus said "And I can cite them in the findings?" and of course your Honor said yes, and not a single case has been offered here to show in the slightest way an inaccuracy which justifies citing a particular page of these depositions in the face of your Honor's very clear-m[illegible]ation that you were going to rely on the summary and that you would take the summary as correct unless the Government could show some error.

Now, where——

The COURT: Mr. Minicus wants to be heard.

10685 Mr. MINICUS. I don't want to interrupt, but that was going entirely too far, sir. When you admitted the depositions themselves I specifically requested of the Court did we have the right to refer to the depositions themselves in the brief and findings and you said certainly.

Mr. GOSSETT. On the basis of a showing, your Honor—I said just what Mr. Minicus has said—on the basis of a showing of inaccuracy, and there is no such showing, and I will show you what they have done, and I want to alert your Honor to this quagmire in the most explicit way that I can.

The COURT. Take for example the first citation by Mr. Minicus, Nelson page 53. If Nelson 53 supports his statement why quarrel

about it? If it is support for his proposed finding why quarrel about it?

Mr. GESELL. Well, I quarrel about it in this manner, your Honor——

The COURT. You can't quarrel about a fact if it is a fact.

Mr. GESELL. That is why I quarrel.

The COURT. You say it is not so?

Mr. GESELL. Yes. Let us take a look at the situation we are in. These depositions were taken out of the presence of court. At great labor and at tremendous effort they were summarized so that the cross and the direct and redirect and recross are all
10686 put together into a form that would state what the totality of the testimony was. That was in accordance with the procedures of the Judicial Conference in which your Honor participated and with your Honor's suggestion and approval.

Now, those summaries have never been challenged as inaccurate. Your Honor has said you will reply on them to make findings of fact. Now, what the Government has done here—and I have no objection to your Honor reading all the depositions if you wish——

The COURT. Oh, don't.

Mr. GESELL. But what I am trying to point out——

The COURT. May I interrupt just a moment?

Mr. GESELL. Yes.

The COURT. Mr. Minicus, can you find the record-citation where the discussion took place on this matter?

Mr. MINICUS. I will try to, sir.

Mr. GESELL. We have it. May I hand it up? It is the bottom of 6967 and on to the next page.

Mr. MINICUS. May I see it before you hand it up, please? The statement I have reference to, your Honor, is at the bottom of page 5923. But I don't believe there is any condition attached to that.

The COURT. Is it your thought that Mr. Minicus did not reserve the right to refer to them?

10687 Mr. GESELL. My understanding—and I just want to get an understanding with the Court—and I must say I don't much mind whether you want to read these depositions——

The COURT. I am not interested in what I look at, whether it is the summary or the deposition itself, as long as the statement is offered as a fact. If that is supported I am interested in it.

Mr. GESELL. What I want to point out to your Honor is this, and this is my sole point about this thing: That your Honor went through this procedure with us and we at an enormous effort and expense prepared these summaries. They have never been challenged. Now, what the Government is doing here is dipping into a bit of testimony in direct or in cross and citing to your Honor

as proof of a fact, and in doing so they are ignoring the testimony that the witness said on the previous page and on redirect and the next time he was up. The summary has that material together in one place. If your Honor wants to take this citation of 53——

The COURT. Let me ask you this question: When Mr. Minicus said "They will become a part of the record for the purpose of appeal and I presume we will also be able to have reference to them for our findings of fact?" And the answer to his inquiry was "Yes," what was your understanding of that conversation with Mr. Minicus and the Court?

Mr. GESELL. Your Honor, I will be frank with you: I have no recollection of my understanding at the time.

10688 The COURT. Well, it is there.

Mr. GESELL. My understanding of that was pretty clear that he could only do that if he showed a material inaccuracy, because that is what your Honor's order specifies.

The COURT. I agree with you.

Mr. GESELL. That is all I am talking about: and that he could not just roam through these depositions in the absence of a showing of a material inaccuracy. The summaries control, because your Honor again and again said that and the order said that. I haven't any doubt he can refer to them in his findings, but he has to do that on the premise that he is showing a material inaccuracy in the summary. If he doesn't, your Honor, it is the other way, and I want to make perfectly clear that I just want to point up what this involves in the terms of the Court's handling of these findings. If that is not the rule, if he can cite these depositions without regard to whether he has shown a material inaccuracy or not, then your Honor is under the obligation of reading the totality of the depositions to find out whether this particular citation is a fair citation to what the man testified as a whole.

The COURT. Well, is it your contention that Finding No. 7, Nelson reference page 3, is in conflict with your summary?

Mr. GESELL. Yes. Let us just go down it and I will show it to you for each of them.

10689 In the case of Nelson, DX-1020, the summary shows at page 304; he testified that cellophane is glassine's most direct and annoying competitor.

Mr. Hopping testified at DX-1007, page 20, that cellophane is acetate's major competitor.

Mr. Ramsay testified at DX-1017, page 230, that the end uses for cellophane are not separate and distinct from those of other materials and customers are not distinct from those for other materials.

Mr. Ellies testified in DX-1014 at page 136 that pliofilm competes with cellophane in most end uses.

Mr. Hanson testified in Dx 1018 at page 253 that different properties do not create different markets; that waxpaper, glassine, and other wrappers all compete with cellophane.

And if your Honor had that testimony before him you would find that these citations that you have here do not support the finding which is that cellophane is a single, separate and unique commodity and, as such, constitutes a distinct part of trade and commerce, because every single one of these deponents testified to the contrary when their evidence is looked at as a whole. That is my point.

10690 The COURT. Can you point to the single line of each one which falls into the category you are criticizing?

Mr. GESELL. Throughout this whole group?

The COURT. Yes.

Mr. GESELL. I have a lot of them to show you as I go along today, Your Honor. There must be, I would guess offhand, a thousand of them in here. I could do it for Your Honor, but what I say to you is—and I want to make it perfectly clear; I don't want to foreclose Mr. Minicus in the slightest way from proof—but I want to foreclose Mr. Minicus from putting these up to you in this fashion unless Your Honor is going to read the deposition in its entirety.

Mr. MINICUS. Your Honor——

Mr. GESELL. This is the second interruption.

Mr. MINICUS. It is not necessary to read the deposition in its entirety. I am sorry about these interruptions but it seems absolutely essential. I think I am establishing my point and I don't think there is any question about it.

Let us turn to Mr. Nelson at page 53. Mr. Gesell does the same thing that a lot of counsel do; he takes a witness' statement. We have not selected this material, Your Honor, I assure you, but if, after direct examination a witness makes a statement, we are entitled to take that statement to show that it is in conflict with the generalities that Mr. Gesell has just cited to the Court.

10691 Now, you have seen what we have said Mr. Nelson is authority for. What did he say?

"Q. Do you consider the glassine and greaseproof papers are separate and distinct products from other types of papers?

"A. Yes.

"Q. Do you consider that the glassine and greaseproof papers are unique products?

"A. I did more so 20 years ago than I do now. I suppose the answer to that would be, yes.

"Q. Do you consider that cellophane is a separate and distinct product?

"A. Yes. Glassine is a paper where the paper stock has been treated mechanically, and as I understand it, without knowing too much about it, glassine is a regenerated cellulose.

"Q. You mean cellophane, don't you?

"A. Pardon me, cellophane is a regenerated cellulose."

The COURT. What is wrong with that, Mr. Gesell?

Mr. GESELL. Well, the thing that is wrong, Your Honor, is that if you read further in that document, you would find a discussion by this man of the market conditions and the competition between cellophane and glassine, and you would realize that when he said they were separate products in the sense that that testimony is, that he did not mean they were distinct parts of trade and
10692 commerce, and when you read the next man, and you found him saying the same thing, and all of these men saying that, I say to Your Honor that what I am put in is this position: I have not cited to Your Honor the specific testimony of a single deponent—these men were all our witnesses; they have contributed enormously to the strength of our case—because I felt obliged under Your Honor's order to cite only the summaries, and that is what I have done, and I say to Your Honor, if you are to accept this without any showing of inaccuracy in the summary, then you must at the same time read those depositions in their entirety, because we cannot let one side and not the other pick into questions and answers. And I think as I go along I can make very clear to you, time and time again, how this technique has been used for the purpose of giving an unfair and improper gloss on the testimony.

The COURT. Well now, the answers which Mr. Minicus just read to me from the deposition of Nelson, Nelson said what he said. Then you go to another part of his testimony, and he said that.

Mr. GESELL. Very well, Your Honor.

The COURT. If you say it is inaccurate, you have the right to point out any inaccuracy that exists any place in this record.

Mr. GESELL. I say it is, and I say it is seriously inaccurate in all of these cases, and I am going to show you a number of them as we go along.

10693 The COURT. It would seem to me that is the province of the advocate to point out inaccuracies to the court. If you want me to find it for myself, I will do it for myself.

Mr. GESELL. I do.

The COURT. But it seems to me that is part of your advocacy.

Mr. GESELL. I think not, not to disagree—and I am sorry I seem to be—but Your Honor said you would rely on the summary in the absence——

The COURT. At the same time I said I would allow reference to the depositions themselves. That is in clear and unmistakable language.

Mr. GESELL. Then, Your Honor, I would ask this: I would ask for an opportunity to present to the Court excerpts from these witnesses because I had gone through this entire trial on the assumption Your Honor was not going to read that and that you were going to rely on the summaries. That is why we put so much time and effort under Your Honor's order to do it, and I would like an opportunity to present to you those portions that we think should be read.

The COURT. Let me think about it before tomorrow as to how you are going to arrange it, how you are going to bring it to the attention of the Court. In other words, if you challenge any particular citation of Mr. Minicus because you say, one, there
10694 are other references to that particular deposition which throw a different light on what the witness previously had said as relied on by Mr. Minicus, I will go to those pages and read them.

Mr. GESELL. That is what I would like to do, if that is the way we are to do this.

The COURT. That is agreeable to me.

Mr. GESELL. Now, going along with this, I have a group of findings from Finding 8 all the way over to Finding No. 20. That group, Your Honor, is concerned with the various properties of these different films and materials. In many cases the record references support the particular statements made. What I want to say with respect to this group, however, is that you can't in many cases relate all of the record references to the precise text; and second, I want to call Your Honor's attention to the fact that we have prepared identical findings responsive to each of these issues, and what I would like to have Your Honor consider is that in cases where our findings match theirs on a specific issue, we have a problem of the weight of the evidence. We have here examples where the evidence looks in one direction and we have presented under our findings the evidence that looks in the other direction, and Your Honor must read both in order to get the completeness of the record as a whole.

The COURT. Well, are you going to give me parallel columns?

10695 Mr. GESELL. Well, we have findings quite like these, which we have prepared, that are specifically responsive to them, and Your Honor must recognize that without reading both our record references and theirs you cannot determine who has the best of the weight of the evidence on one of those points, and we have quite a number of that kind and we have examples addressed specifically to this group.

Many of the record references here, Your Honor, for example, don't bear any particular relation to the facts covered in the find-

ings. Under Finding 8, for example, there is a reference made to GX-6004. You will see that it is a statement by the Glassine and Greaseproof Manufacturers Association showing the distinctiveness, desirability, properties, low cost, and so forth, of glassine. It does not in our view relate to the issues under that finding.

Under Finding 9, if Your Honor will check it, you will see, for example, a reference there to transcript 5931—and there are quite a number of these throughout—to the testimony of Mr. Smith. Well, he did not testify on that page.

They cite Mr. Martin, under this same Finding 9 at transcript 6378, but the only thing that Mr. Martin says at that page that we can find is that it is the printing on cellophane and not the cellophane itself that sells the package.

GX-88 is cited there, for example, at page 340. It has no relation at all to the finding.

10696 Jakes, transcript 22, there is a reference to a deposition; we could find no relation of that testimony to the finding.

Quite a number of these record references are extremely tangential and remote and in fact often have no bearing on the specific fact issues that are set forth in the finding.

Finding 10 is another example. Southwick is cited there—this is one of these deposition situations—and it directly contradicts the finding for he states, there are a number of materials that will solve the packaging problem. Yet there the finding is that this was a distinctive all-purpose wrapper.

Leeds, on the deposition, creates again the same problem.

Under Finding 12, DX-205 has nothing to do with the finding. The page cited talks about duPont's concern with Pliofilm campaign and not to develop the meat business, and that doesn't seem to us to have anything to do with that finding.

What I say to you is that there are against many of these findings some transcript references in point, many that are not at all in point, and the difficulty of determining the relation of the record references to the findings is greatly emphasized by the lack of any relation between the record references and the specific fact statements in the findings themselves.

10697 Another example, Your Honor, of what I am talking about on these depositions appears in Finding 11. You will see there another great group at the bottom of the depositions; Horn is cited at page 57 where he testified that cellophane has eye appeal on a carton overwrap on tea packages. Then you see the finding says that one of the characteristics of cellophane is eye appeal. Do you see that in the finding?

The COURT. Yes.

Mr. GESELL. And he does say on page 57 that cellophane has eye appeal, but if you go to page 75 of his deposition, he says that all

papers and aluminum foil have eye appeal. Well now, that is the kind of thing we are concerned with. The summary shows clearly that Horn testified that cellophane, aluminum foil and the papers have eye appeal; but if Your Honor relies on a particular citation of that kind, you are bound to be led to the impression that this witness testified that cellophane had eye appeal, and clearly the Government's inference is that nothing else had eye appeal. And yet that is not the fact.

Under finding 12, Your Honor, they have some depositions. There is McCurry, and it is cited there at page 103, to the effect that you have to pack potato chips in cellophane to meet competition. This is apparently relied upon to support the finding as to the inability of the packagers to compete unless they use cellophane. But he also testified, Your Honor, that many companies put potato chips in glassine or foil.

10698 Now, unless you have the totality of the testimony, again you don't have the true purport of the evidence to which you are being cited.

Take one more in this area. Under Finding 16, again in the depositions, Hanson is cited for his statement that cellophane has eye appeal, but elsewhere he testified that any material converted by Milprint has eye appeal and that all successful packages must have it. That is omitted from these references. You will find it in the summary at DX-1018, at page 254.

So all I am saying to you is that again and again the selection of specific pages on these depositions doesn't carry the day.

The COURT. Well, your remarks would have pertinency whether we had the summaries or we didn't have the summaries. It is an inaccurate way of making references in the record.

Mr. GESELL. Precisely. But if the summary was cited, he would have to show it all because it is all in one place, and Your Honor's eye would not avoid it, whereas the selection of one page out of a 200 or 300 page deposition puts the matter in a much more difficult posture from our point of view. He couldn't have cited in the summary to this eye appeal testimony without citing you to the sentence that had it all there and then you could see whether it had something to do with the case or not.

10699 Now, going on, Your Honor, there are other extraordinary problems that we have to deal with. Turing to Finding 22, on page 10. There is a finding that you would think you could rely on like the Rock of Gibraltar. We have been trying this case from the very beginning and there is a statement of the plants we operate. Well, it is wrong. It is just wrong. These are not the six plants that we operate. The complaint itself alleges that Buffalo No. 1, which they have listed there, was closed in 1942, and they list it as still being in operation. And the answer

to Paragraph 17 said that it was closed. And they haven't listed Clinton No. 2, which began production February, 1947, as their own exhibit shows, GX-394, page 5482. And if you want to know what plants are in operation, look at our Finding 3 and you will see it correctly stated. It is a minor thing, to be sure, but it is a quagmire that many could fall into because one would think after trying the case this long we would have a correct list of the plants.

Now, going on to another kind of problem. We have many of these, Your Honor, that are highly——

The COURT. Let us go back to your No. 3. You said that the Government should not have made reference to Buffalo No. 1?

Mr. GESELL. As being a plant that we operate.

The COURT. Well, you make reference to it.

Mr. GESELL. Not as operated. We have two plants at Buffalo, Your Honor, 1 and 2. And 1 is shut down. 2 is in
10700 operation. They list two plants at Buffalo, which is in error. They don't list the other plant at Clinton.

The COURT. You say you commenced operations at the following plants. He said, the following plants are in operation. Is that it?

Mr. GESELL. Yes, he has the wrong list of the plants that we have. He has left one out, and he says that we operate one that we don't. It is a factual error.

Findings 25 to 42 is another group. Your Honor, I find it very hard to know how to deal with something like the last sentence of Finding 25, and I have assumed that that type of a finding, supported only by references to the argument of counsel, will not receive the consideration of the Court. I don't understand it, if it is a statement of fact, and there is a good deal of that that Your Honor will notice as you go through. Finding 25 apparently rests entirely on quotations from the argument of Mr. Minicus.

Finding 26, if you check the record references after it, you will find no support for the first statement thereof, no support for the second sentence, and no support for the last sentence of that.

The COURT. In short, there is no support for all of it?

Mr. GESELL. No. There are four sentences and I think
10701 one of them, the third sentence, has pertinency to the record references. But again you must read those to find them out. I want to point out I am talking examples here. I couldn't conceivably in the time I have deal with each of these record references.

Take a look at Finding 27, which is the next one. It purports to compare, Your Honor, 1950 production with the market potential, and they have cited to you there all of the exhibits on this market potential issue except the one exhibit that explains what the market

potential is, GX-6011, at page 7963. And when you don't have that exhibit cited to you, you don't know that this whole statistical presentation in that finding is erroneous, because the potential bears no relation to demand, and if they had cited the exhibit, you would see that. But it is purely a theoretical amount computed on the assumption that all customers of a class utilizing cellophane would use only cellophane, and they then talk about a shortage, and they cite to you none of the testimony of Martin, Croy, or Smith for example, which shows that there is no shortage.

Now, Finding 30—as an example, we have covered those issues in our Findings 37 to 79, and 155 to 171, and there again the Court will have to weigh the evidence that we have against the evidence that they have selected. If you want to test the accuracy of that group of sub-findings under 30, Your Honor, which we say are grossly misleading in a number of respects, we suggest as
10702 an example that you read Finding 30d relating to cellulose
. . acetate, and you will find that those record references in large part are wholly unrelated to the material against which they have been put.

Now, take a look at Finding 35. There is another one of these asterisk findings. There is no proof under that finding or any later findings of duPont's vast resources or the quantity and nature of duPont's machines and equipment providing it with potential capacity beyond the reach of the industry, or that our position has the effect of suppressing the substantial competition which would otherwise arise. Those are the kind of things that are put into these inducing paragraphs which you won't find carried over and supported by the material that comes later.

In 36 you will find references to preferential freight rates. There is no transcript reference that supports any preferential freight rates. There is a statement by Reichel that he was at a freight disadvantage because of the location of his plant—nothing to do with preferential freight rates.

Finding 38 we match with our Finding 695.

Now, he has done a good deal of statistical work, the pleader has, and some of that I want to comment on as another problem. Finding 39 is an example. That is at page 20. What he does there is take and make statistical comparisons for the purpose of minimizing the efficiency of duPont's operations. He wants to show that there was a very slight divergence between the ef-
10703 ficiency of the two concerns. The basic documents on which he relies are GX-394 and GX-410, which are schedules of production of duPont and Sylvania and the record of casting machines and operations. Weil, we have taken the figures, Your Honor, and made the computations, and instead of coming out

with the percentages he has, which he calls a slight divergence, we come out with a wholly different percentage. Our records show that in 1934 our efficiency was 105.4 over Sylvania in terms of production per casting machine; in '37, 124 per cent; in 1940, 111 per cent; in 1943, 142 per cent; in 1946, 132 per cent. Far from being a slight divergence, it was a very substantial divergence. And then he puts into his finding there a statement, Your Honor, in which he says that this slight divergence, which is not such at all, is attributable in large part, he says, to the machines and geographical dispersion of the machines and to the ability of duPont to shut down obsolete machines and to install in their place new and speedier types. There are no record references to support that—none whatever.

Finding No. 40 overlooks entirely that duPont's percentage is 68 percent, not 75 per cent. It overlooks entirely the proof that other materials are in short supply. And we feel it rather seriously distorts Exhibit 6024.

Then let us take up this group of findings—we are now over, Your Honor, in the monopoly position, you will notice, and if I may, I would like to take this group of findings under 41 by way of example.

10704 The COURT. That is as to Olin?

Mr. GESELL. That is Olin, and it goes all the way over to page 25.

For example, the finding says that in the field of cellophane Olin is completely a product of the acts and will of the defendant. None of the citations relates to that. The finding says that applications—we are in 41a here in the middle—applications for licenses by small producers and foreign manufacturers were not encouraged, and the citation is to an exhibit that says, GX-594, duPont received inquiries from over a hundred different parties, most of whom showed no further interest after being informed of the magnitude of the investment required.

Well, I don't see that that supports that applications for licenses by small producers were not encouraged.

The finding says, subsequent to the adoption of the aforesaid policy every major action undertaken by the defendant was evaluated against the impact of said action upon the litigation. Do you find that, Your Honor?

The COURT. Yes.

Mr. GESELL. Now, there is an example. The only record reference—and this is where this kind of thing pops up when the record references are related to the subject matter such as there—the only record reference you will notice is at transcript 7109. Well, that is Mr. Minicus saying so.

10705 The COURT. Do you remember what Justice Holmes used to tell his law clerk, "If you have any citations to give me in this opinion, find another opinion that I have written."

Mr. GESELL. Well, I am a little sensitive about this because when he made the statement that he cites himself to, I challenged him and said that he wasn't justified in saying it on the document. Your Honor said, at page 7112, that there was no evidence of it, and at 7112, which he has not cited, Mr. Minicus denied that he was making the statement that he cited to you at 7109. So by and large that is a rather weak reference.

The COURT. Well, maybe he was persistent that he was going to have that in this case.

Mr. MINICUS. Of course, it is also understood, your Honor, that we will answer this tomorrow.

The COURT. Yes.

Mr. GESELL. Under Finding 41b, it is stated, its plans for future expansion are vague, and it cites the testimony of Mr. Olsen. Mr. Olsen said he has bought a new plant site and intends to build: it will be ten machines with the possibility of twenty if business warrants. I won't believe that Mr. Carpenter and his associates in the Film Division consider that exactly vague.

In Finding 41c he refers to past patents of so-called cooperative and collusive activities, although on the trial it was acknowledged that all of this occurred prior to 1933.

10706 Finding 41c (1), for example, your Honor, omits entirely the repeated references to the efforts of duPont to sell its stock back to Olin, such as you will find covered in our proposed Finding 675.

Now, you will find another little trick—and there are a lot of these coming along—41 (3). You will notice the pleader says, from time to time representatives of duPont and Olin have sat together on the Board. Well, the proof shows that that was entirely prior to 1918. Now, that is a quagmire, your Honor, and there are lots of them like that.

10707 Finding 41c (4) is not accurate. Olin did create new productive facilities for high explosives, as the record shows.

Finding 41c (5) was categorically denied both by the testimony of Mr. Olson——

The COURT. Will you go back to 41c (3) for me?

Mr. GESELL. Yes.

The COURT. What are on those pages which he cites?

Mr. GESELL. Well, I think transcript 7144 is the transcript we have here and I think that is Mr. Minicus talking. I don't have before me the detail of what each of these record references shows. The fact is we had no one on the board, your Honor, after 1918.

Finding 41c (6), he fails to mention that Olin did make smokeless powder. Your Honor will read the ICI opinion for 41c (7) and you will see there has been something of a gloss on that opinion.

Finding 42 is a very long and involved finding, and now I want to show you again the kind of thing that we run through in these.

Finding 42 says "Sylvania concededly continued to exist only at the sufferance of duPont." You will find that, your Honor, a third of the way down on page 26.

The COURT. Yes, I have it.

Mr. GESELL. "Sylvania concededly continued to exist only at the sufferance of duPont."

10708 Now, there was a very serious statement, and the transcript reference is to something I said, and this is what I said:

"After we notified them of the patent they continued intentionally and blatantly to infringe. We brought suit against them to enforce our patent rights. We could have put them out of business entirely. They could not make moisture-proof cellophane without rights under our patent."

That is the only cite for the statement that concededly they continued at the sufferance of duPont. That is a glossy quagmire if I ever saw one.

Another one there right after that: "In caps and bands, Celon appeared to share the same precarious existence." Your Honor will note these are related to a date of 1950.

The COURT. Yes.

Mr. GESELL. Well, the citation there is to a 1933 document.

Now, the finding says, in effect, duPont stimulated demand, but never without ascertaining in advance that it could supply—that it could anticipate increases in demand years in advance with extraordinary accuracy; that it anticipated demand, expanded facilities in contemplation of increased demand and depressed price—that is the phrase for reduced price—to assist in realization of these potentials.

Now, your Honor, the record references are all over
10709 the lot and they don't support this notion, for example, that we have been able to forecast with extraordinary accuracy. GX-417, 420, and 421, for example, which are right in this row, all discuss in detail how sales have greatly exceeded forecasts and that people are concerned about it and it doesn't work out the way they thought it would, and those are cited to your Honor as proof of our extraordinary accuracy.

Now I want to make some comments about these time factors. I mentioned that the dates are not given, and frequently documents

in the early 30's are cited as though they establish facts today, and there are quite a number of interesting chronological problems.

Finding 57, for example, the phrase is used "Throughout most of the period and continuing down to the year in which this lawsuit was instituted" the defendant divided the sales activities into two sections, direct and indirect. Well, we still do, always have, and still do and always will unless your Honor enjoins us from it, which I doubt that you will; and I can't understand that approach.

Now, Finding 60, and I am just talking on this time factor for a minute, which is on page 37, you will notice that it says, "The exclusivity clause was deleted from promotional converter contracts just prior to this litigation." Well, all the contracts were terminated January 1st, 1947 as their own GX-5034 shows, 10710 which was almost a year prior to the litigation. The complaint was dated December 13, 1947.

Now, your Honor, you will notice how it goes the other way. On Finding 72 at the top of page 47 the statement is made, "Price reductions were announced far in advance of their effective dates." Well, far in advance of the effective date was an announcement in May of changes that occurred in August and October, as GX-464 shows. So that two months or four months is for the pleader's purposes put in here as far in advance on page 47 in that finding while 11½ months are "just prior" on page 37, and the time quagmire therefore is also here.

You will notice Finding 60, the statement that there were exclusive sales contracts with promotional converters throughout most of the period covered by the complaint.

The COURT. Which one is this?

Mr. GESELL. Finding 60. It is down at the bottom of page 36. The statement is made that these exclusive sales contracts with promotional converts throughout most of the period covered by the complaint and they cite GX-5378, and that is their only cite, and that is a 1942 contract.

The COURT. Let us call that one a booby trap.

Mr. GESELL. All right, your Honor. Whereas GX-5541 shows that the contracts existed not for this 24-year period of the complaint, but their own exhibit shows, GX-5378, that they existed from 1939 for a period of eight years.

10711 Take another one, Finding 62. These are all sort of time quagmires, your Honor. They refer there to the continued domination of the large cigarette accounts. Now, that statement is supported only by GX-5001, and that is a document dated 1934 which states that duPont had practically all the cigarette business. The report covered a period of 21 months when Sylvania was just getting started, and that is cited to you as support for this

sweeping statement in the finding of the continued domination of the large cigarette accounts, and yet they have another exhibit, GX-410, which they don't cite, which proves that for every year from 1941 to 1948 two or three cigarette customers were among Sylvania's ten largest direct customers, and the Replogle affidavit says that Sylvania avoided heavy commitments on the cigarette business. And so the evidence shows there is no continued domination of the cigarette accounts, and you are cited to an exhibit that relates to a limited period of a few months when Sylvania was just starting.

Now, Finding 66, it is stated in Finding 66, your Honor, which is over on page 41 and over the top of page 42, that duPont has for many years discouraged—talking about shortage. Well, that statement is supported by four exhibits. You will see them cited. Those four exhibits cover a period of six to nine months after

V-J-Day, immediately before duPont's new capacity came
10712 into operation. For many years we have discouraged, and

they are talking about the immediate post war period of not more than nine months, and their whole exhibit covered just that span.

Finding 344 is another example of this kind of thing. There in Finding 344 on page 147—it is a short finding—they are talking about Dobeckmun and Humitube, and they say that both Dobeckmun and Humitube happened to be promotional converters who at that time were under contracts, and so forth. Well, the only two documents cited by the Government are dated 1940 and 1941, and the agreement to which they refer was executed ten years earlier, November 12, 1931, as their own immediately preceding finding 341 shows. There is no relationship, then, in point of time. Happened to be, and citing 1941 documents to indicate a status in 1931, and as I have already told your Honor, the promotional converters did not come into existence until 1939. So again there is this time quagmire.

Finding 64 is another one which I want to mention briefly in this same way. The only support cited for the assertion there as to the limited number of alternative sources did not permit efficient elasticity in production schedules to provide for market contingencies—do you notice that at the top of page 40?

The COURT. Yes.

Mr. GESELL. There is a strong suggestion there of du-

Pont having gobbled up all these market outlets and
10713 limiting the number of alternative sources. Well, the only

citations are prior to the time that even Sylvania started business, so it can have no possible relevancy to the subject matter of the finding.

Now let us look at another thing. I have talked about this being a theoretical case and I continue to think it is. Let us look at the kind of a booby trap—and I think it is a fair word here—that they fall into themselves. Finding 63 says, "duPont, through its own miscalculation of the market, has curtailed severely the total supply of cellophane." Do you see that in Finding 63?

The COURT. Yes.

Mr. GESELL. Now turn to Finding 64, if you will, your Honor, which is the next one.

"Subsequent to 1940", it says, "the defendant was no longer able to control the market factor of demand, because of world conditions and its own miscalculations with regard thereto."

So we are pictured as being unable to calculate the market and as to have created these shortages.

Now turn to Finding 42 at page 26 when they are in a different section of their case and what do they say?

"duPont has been enabled to anticipate future increases in demand, years in advance of their occurrence with extraor-
10714 dinary accuracy." What about that, your Honor? Two smashing findings against us for miscalculation, smashing findings about our shortages, and another finding just a few pages away saying how careful and able we have been in planning. Now, there just isn't any rhyme and reason to that, and I can only assume that the offices of the Anti-Trust Division must be further away from each other than I realized.

Similarly in the case of Finding 68 it is stated there in Finding 68 that duPont's prices were set without regard for the normal influences of competitive market factors, and yet in Finding 72b, if you will turn over to that, a few findings later, it says that "Virtually each of the first 17 price reductions are tainted by an anti-competitive purpose." How we can fix prices without regard to competition in one finding and at the same time have an anti-competitive purpose in all the prices that we fix in another, I find very hard to understand.

The COURT. Where is that, on page 49?

Mr. GESELL. About halfway down.

The COURT. Yes, I have it.

Mr. GESELL. Let us look at another kind of problem, Finding 76a.

Are you going to take a recess, your Honor?

The COURT. Yes, let us recess for five minutes.

(At this point a brief recess was taken.)

10715 Mr. GESELL. Now, if your Honor would turn for a minute to page 68 you will see Findings 103 down through 106. I just want to show you what happens to those references. These

are all findings that are based on other findings, your Honor will notice. Finding 323 has no references under it when you turn to 323. Finding 339 refers solely to a block of transcript containing the Government argument. Finding 100, which is the next one in Finding 104, refers only to Government argument. Finding 144 and 145 are each supported solely by the text of the technical agreement between V. D. C. and Viscose Francaise. Finding 293, dropping on down, 305, 313, and 317 are all supported by references to Government argument at the same place in the transcript for all four of them. So here is an area where you chase all these findings through and they send you to other findings and then you chase to the record references there and you are back to what Mr. Minicus said, and that is all you have in terms of proof. So we say be cautious and watchful about them.

Now let us take another kind of use of the evidence, Finding 76a which appears on page 56, and the part I want to call your attention to starts at the bottom of 56 and goes over to the first sentence on the top of page 57.

The COURT. Yes.

Mr. GESELL. The sentence at the bottom of 56 says, "In correspondence with its West Coast representative Sylvania 10716 was in a position to [illegible]ward confidential advance information relative to du[illegible]t's prices." Well, GX-5478 cited for this states in a letter form from Mr. Replogle to one of his people, "I am enclosing herewith confidential advance information showing changes in cash discounts we are making." In other words, that Sylvania is making, nothing about confidential information from duPont. As far as duPont is concerned, he simply says "duPont have abruptly and arbitrarily announced to their customers"—so that the duPont price was publicly known, and that would have been much clearer to your Honor if the Government had bothered to cite GX-5578, which is in this series and which shows the public announcement of duPont's prices.

Now going on, "In 1942 Mr. Replogle was able to state"—Now, doesn't that imply that he got the information from duPont? I can't conceive of anything else, and yet the transcript shows that the basis of his statement as he was testifying was either customers on the Pacific Coast or someone in Zellerbach, and transcript 1124 shows that and isn't cited to your Honor. So that is just quoting from the evidence without regard for its completeness.

Now let us take another one, Finding 229. I am trying, your Honor, to cover backward and forward here as well as I can in the time.

10717 There is a serious finding and it is short. "In November of the same year, 1935, Sylvania decided not to enlarge its

production facilities because there was no possibility of selling any additional moistureproof at a profit."

Well, now, GX-2681 refers to GX-2639 which refers to a remark of Wallach in which Wallach said that it did not seem advisable to provide for further production when there was no possibility of selling it profitably. The other reference is to when Mr. Minicus introduced that exhibit in evidence, his own statement. But they don't cite to you their own exhibit 410 at pages 5595, 96, and 92 which shows the following—and watch the dates—that in 1935 Sylvania had 15,300,000 pounds capacity and 15 casting machines; in 1936 it was up to 20 million with 17 casting machines; in 1937 it had 18 casting machines and was up to 23,700,000; in 1938, 26,400,000 and 19 machines; and that is their own statistical showing; and in that period moistureproof production went up every year from a little over 8 million to over 13. How can they ask your Honor to find something of that kind in the face of that evidence?

Finding 115 is one of those comparable to the one your Honor called my attention to earlier. That is all Government argument under that finding. Then you will notice that the next finding is an asterisk finding, and the next findings is an asterisk finding, and there is a pyramiding of three asterisks findings, one of
10718 them cites back to the other, and they are all documented by the arguments of Government counsel.

The COURT. Did you say 117 also?

Mr. GESELL. 117 is asterisked, yes, and that is also in that group.

Now, if your Honor will turn to 153, that is an example again of a failure to present the evidence in its entirety. It says that duPont complied with territorial restrictions by refraining from exporting to countries beyond the allotted territory. Well, they have an exhibit—they have two of them, your Honor, GX-399, and it is cited there you will notice, and GX-1061, and it is cited there, but both of those show all kinds of exports outside the western hemisphere which was the allotted territory, and they fail to support the precise statement for which they are used. So that even when they cite an exhibit that seems to relate to the subject matter, it is often, as in that case, quite obviously miscited.

Now, another in this same area is 172. In 172 I think a fair boiling down of that is a statement that for 1945, 1946, and 1947 duPont did not ship outside the western hemisphere, as those years are specifically covered, and that is flatly contradicted by DX-823 and 855 which show duPont selling cellophane in Europe, Africa, Australia, and Asia, and those exhibits are not called to your Honor's attention.

10719 Now let us take a look at Finding 177. There is another one of these starred findings. The Government has conceded that the product claims of the moistureproof patent were valid, and in Finding 181 they mention that duPont determined that Sylvania was infringing and Sylvania admitted the same thing, as Reichel's testimony in GX-2482 says, and it necessarily follows, therefore, that Sylvania would have lost the infringement suit and duPont could have prevented its further manufacture of moistureproof. It seems to me that here the Government in asserting that duPont alleged eagerness to settle and suggests to your Honor that duPont should have pursued its remedy and suppressed Sylvania's moistureproof production entirely is not in point, and the only thing they have to support that argumentative approach which is contrary to the facts are these references to arguments already made to the Court.

Finding 191, there is a statement in there that the license agreement was a subterfuge. Do you see that?

The COURT. Yes.

Mr. GESELL. This is a non-asterisk finding. Well, that reference to the citation is again a citation to Mr. Minicus, not even reading or quoting any evidence in this case. It is just his statement it is a subterfuge.

10720 And so what I think we come down to on this, your Honor, is the need of extraordinary care in the reading of the record references and in making certain that the record references are complete, because rather substantial liberties are being taken with the evidence.

I don't know how more graphically to illustrate that than to ask you to turn to Finding 97, and that is particularly important from our point of view, because you will notice they talk about our manifesting an intent to control all the patents relating to moistureproof, and intent is important in this case; and they say we purchased the Rosenberg interference by reason of this intent. Well, now, your Honor, there is a series of exhibits on that issue, and they cite one that suits their purpose, GX-2802, and then they cite one a little on the other side, GX-2805. Well, I hope in these groups like that you will read in between, because they do not cite GX-2804, and the reason they don't cite GX-2804—and this is particularly troublesome to me, your Honor, when they are all their own exhibits and it is not a failure to call attention to some evidence of ours, but it is evidence of their own as part of the story—GX-2804 is a letter from Mr. Pritchard, the duPont patent counsel, reporting on this litigation, and look at what he said:

10720 "We completed Dr. Charch's testimony and had taken about half of my testimony on Thursday evening. Fifty

exhibits had already been put in. At the end of that time, i. e., just before we adjourned for the day, Mr. Darby informed me that he intended to advise his client not to spend any more money in the matter but to endeavor to effect a settlement with us. While I did not see Mr. Darby's letter of instructions from Mr. Flehr, he read us portions of it, and we surmised that his instructions were to attend the testimony and cross-examine the witnesses up to a point where it appeared no useful purpose could be served, and then to stop and not incur any more expense. Mr. Darby immediately got in touch with Mr. Flehr, attorney for Rosenberg Bros. & Company in San Francisco, on the long distance and ascertained that Mr. Rothschild, the President, was in Washington. Mr. Flehr agreed to settle, and when Mr. Darby got in touch with Mr. Rothschild on Monday he also agreed to settle."

And so if they had cited you the story it is apparent after duPont put in only a portion of its evidence, including the testimony of its own inventor, on the advice of Mr. Darby, a knowledgeable man, they came in and said, "We don't want to go on and cause any more expense in this patent suit that is going on. We will settle. You have the priority and you have the claims."

How can they try to suggest intent issues of that kind and then not call Your Honor's attention to the basic 10722 document in the sequence?

They use another procedure of somewhat the same kind in Finding 82 where the effort is made to suggest some kind of improper conduct. Finding 82 says that sometime prior to 1929 and particularly 1925, duPont desired to prevent importers from shipping cellophane into the country, and then it said, "However, its patent position was still insufficient and it was forced to turn toward other means of accomplishing this objective."

Well, that certainly has the most sinister kind of sound. The other means were to go down to Customs Court and say you have improperly classified cellophane under the tariff, and we think a citizen should properly do so, and the court said yes and did, and there was nothing very sinister or improper from a motive point of view or anything otherwise about that.

Now, Your Honor, I seem to be approaching the end of the very liberal time you have allowed me. I want to again observe with all the force I can that on this use of the deposition the failure of the Government to challenge the accuracy of the summaries always had seemed to us a confession by the Government of their accuracy, and hints that the summaries state all the facts and the whole facts.

The COURT. Well, I am going to read the summaries and I am going to accept them as true.

Mr. GESSEL. Very well, Your Honor.

10723 The COURT. If there is anything inaccurate in the summaries such may be pointed out to me, otherwise I am accepting the summaries.

Mr. GESELL. You will accept the summaries?

The COURT. Yes.

Mr. GESELL. Very well, Your Honor.

10724 Now, I want to say this in conclusion. There is always a great temptation to try to sum up one's whole position. I am not going to do that. You have been most patient and I have talked quite a long time. But sometimes cases that seem very large and complicated and full of very complex questions can be decided in straight, ordinary, everyday terms, and it seems to me the proper commentary on this case when you look at it all as a whole is that the Government filed a complaint, that its evidence failed to support the complaint and that the complaint must be dismissed.

Mr. MINICUS. Your Honor, may I have just thirty seconds of my rebuttal time?

The COURT. You can have thirty seconds.

Mr. MINICUS. Perhaps I could clear up some of the difficulty that have pervaded the entire discussion of our findings.

Any one of these transcript citations here that have appeared, such as on page 43, where we have a long series of T's, there is a regular structure to the way we have presented these findings, and wherever that asterisk finding appears, that only means that it is a general finding to be supported by the other findings that follow it until we reach the next asterisk. If the findings following it fail, of course, that fails. But I do want to correct one misinterpretation. Where those T references are to the

10725 record, they are not exclusively to my comments; they are to every part of the record, that is, the reporter's record, including the documentary evidence or the testimony, or whatever is in there to the entire section—in other words, we feel that these findings are intended to assist Your Honor——

The COURT. Just a minute. Get ahold of a copy of your findings.

Mr. MINICUS. I have one here.

The COURT. Turn to page 42.

Mr. MINICUS. Yes, sir.

The COURT. Put yourself in my position when I come to study this case. We will take your proposed Finding 68 with an asterisk alongside of it. Now, show me where the material contained in that paragraph is supported by a subsequent finding.

Mr. MINICUS. Well now, may I explain one thing first——

The COURT. You are the judge, see. Now, what do I do? What, finding do I look at?

Mr. MINICUS. Why, this is a very general finding, and so is 69 following it, intending to introduce all the material that comes after. That would be in the finding of 70.

The COURT. What part of 70?

Mr. MINICUS. Well, 70 is quite a lengthy finding bringing out several points.

The COURT. Well, what am I going to do now? You are the judge and you want to support that when you come to 10726 write your opinion. What do you do?

Mr. MINICUS. Why, our purpose was that after you had read 68, then you would have that listing of T's at the bottom, that should refer you to every bit of the evidence in this case on that general finding.

The COURT. But Mr. Gesell says it is not evidence; it is your argument.

Mr. MINICUS. I am sorry, Mr. Gesell is not accurate on that. That includes my introductory statements, and then as I started to offer the documents in evidence and read those documents, the reading directly from those documents, sir, is right in there. In other words, it covers a complete section—1598 to 1624 might cover a whole day's trial testimony, with the evidence and everything else in there. That is the point I wanted to make, sir.

The COURT. You mean I have to read all that?

Mr. MINICUS. No, sir; if you don't care to read it, you can go to the specific findings that follow it. Then if you have trouble——

The COURT. But you can't point one out to me. That is what I have been asking you. Which specific finding or which part of any specific finding do I look at?

Mr. MINICUS. I have just opened the book at random——

The COURT. That is what I did.

Mr. MINICUS. I will have to review that finding, if 10727 you will let me.

The COURT. Maybe we can clear that up tomorrow morning.

Mr. MINICUS. May I do that tomorrow morning?

The COURT. Yes. Adjourn court until tomorrow morning at 10:00 o'clock.

(At this point the trial was adjourned to Friday, January 9, 1953, at 10:00 o'clock a. m.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 162

UNITED STATES OF AMERICA, APPELLANT

vs.

E. I. DU PONT DE NEMOURS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

FILED JUNE 23, 1954

PROBABLE JURISDICTION NOTED OCTOBER 14, 1954